Supreme Court, U.S.
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No. 06-1187 FEB 26 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

REV. D. PHILIP VEITCH,

Petitioner,

v.

THE HONORABLE GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In determining whether a chaplain's resignation is voluntary, may the Court of Appeals, contrary to the principles of *Sorrells v. U.S.*, 287 U.S. 435 (1932), *Mapp v. Ohio*, 367 U.S. 642 (1961) and *Rochin v. California*, 342 U.S. 165 (1952) ignore gross governmental misconduct, specifically forbidden by statute, that formed the motive, basis, and source of information for the government's adverse action leading to the resignation?

II. May the Court of Appeals ignore the religious nature of conversations between two chaplains disputing sermon techniques and topics in the statutory protection given those sermons that formed the basis for an allegation of disrespect on the part of the junior chaplain?

III. Is the lower courts' failure to confront and sanction obvious and gross government conduct a significant departure from the accepted and usual course of judicial proceedings such that it calls for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is the Rev. D. Philip Veitch, a former Navy chaplain.

Respondents who were Defendants-Appellants in the court of appeals below are the United States Navy and the following persons in their official capacity: Secretary of the Navy (the "Secretary") currently the Hon. Donald C. Winter, (Gordon England when argued to the Court of Appeals); Chief of Naval Personnel, currently Vice Admiral John C. Harvey; Chief of Chaplains Rear Admiral Robert F. Burt; Captain Ronald Buchmiller, Petitioner's former command chaplain in Naples, Italy; and the U.S. Navy.

CORPORATE DISCLOSURE STATEMENT

No party is a Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Reverend D. Philip Veitch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the United States Court of Appeals for the District of Columbia is reported as *Veitch v. England*, 471 F.3d 124(D.C. Cir. 2006), and is set forth in the Appendix beginning at A-1. The opinion and judgment of the District Court for the District of Columbia granting the Respondents' motion for summary judgment and is set forth in the Appendix beginning at A-24.

STATEMENT OF JURISDICTION

The judgment for which review is sought was entered by the Court of Appeals for the District of Columbia on November 28, 2006. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1343 and 1346, and 5 U.S.C. § 702.

CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States.

"...nor shall any person be...deprived of life, liberty, or property, without due process of law...." Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

"An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member." 10 U.S.C. § 6031(a).

"Chaplains shall be permitted to conduct public worship according to the manner and forms of the church of which they are members". Navy Regulations, Article 0817.

STATEMENT OF THE CASE

This case is likely to determine the judicial treatment of governmental misconduct in military civil cases, the protection of free exercise in the military, and whether there may by an establishment of a military religion of "pluralism". The District of Columbia Circuit Court concluded that the Navy's violations of federal law, its own regulations and the Constitution could not be considered.

This case addresses the question whether the Court of Appeals can close its eyes to obvious and open statutory violations which prevented Protestant free exercise on American military bases in Italy and ultimately led to Petitioner's resignation as a Navy chaplain. *Sorrells v. U.S.*, 287 U.S. 435 (1932), *Mapp v. Ohio*, 367 U.S. 642 (1961) and *Rochin v. California*, 342 U.S. 165 (1952), hold in a pure

criminal context that courts should not close their eyes to or lend their powers to approve gross misconduct on the part of the government. Here, obvious statutory violations which protected the Petitioner chaplain's right to preach according to the customs and doctrines of his church were ignored by the Navy and the courts, authorizing the Navy's censorship and retaliation against the chaplain for failing to conform his sermons to an undefined doctrine called "pluralism among religions." When confronted with that question, the Court of Appeals looked at the constitutional dimensions of whether the Navy could require a chaplain to conform to its own view of the proper sermon and declined to address the issue.

> Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices. The services are understandably concerned about unit morale. And those of us old enough to remember World War II movies will recall scenes of chaplains at the front line performing services for soldiers of different religions. On the other hand, Reverend Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim. Fortunately for us—and unfortunately for Veitch—we need not decide this difficult question. We agree with the district court that Reverend Veitch may not raise this issue because his resignation was voluntary and because the Navy did not act unreasonably in

> refusing to permit Veitch to withdraw his resigna'

App. at page A-5. The Court of Appeals either forgot or closed its eyes to the fact Congress had already spoken on the issue with § 6031 and the Navy had reproduced that statute in its regulations. Because Congress had spoken, the Court of Appeals had an obligation to address the question because it was obvious that the Navy had violated the statute and its own regulation. The Court of Appeals' decision is totally silent on § 6031.

The Court of Appeals also failed to address the consequences of the Navy's violations of § 6031 and the consequences to petitioner by objecting to its violation by his command chaplain. By ducking both the statutory and constitutional dimensions, the Court of Appeals failed to follow this Court's rule that the appellate courts have a special responsibility to examine Establishment Clause issues. By so doing, it gave court approval to an obvious and gross statutory and constitutional violation, allowing a Catholic to abridge Protestant free exercise, denying Petitioner of his rights and blessing the Navy's blatant violation of the rule of law. Once the legality of the basis and source of information for all the Navy's adverse actions, the flawed Equal Employment Opportunity ("EEO) report, is addressed in the context of § 6031, all of Respondents' actions against Petitioner become not only retaliation, but violations of the Establishment, Free Exercise, and Due Process Clauses.

The lower courts ignored the obvious violation of § 6031, its consequences and the adverse action which flowed from Respondents' faulty investigations. The lower courts

thereby incorrectly concluded that Petitioner resigned voluntarily. This inherently assumed that objection to a senior chaplain's censorship of Petitioner's sermons in private e-mails was disrespect, and it treated the circumstances surrounding that resignation and subsequent quest to withdraw it as having no consequence to the question.

At both the district court and the Court of Appeals, petitioner argued that all of the events which led to his resignation, including misconduct charges for disputing his Catholic command chaplain's right to censor sermons in a Protestant congregation, were based on the EEO investigation report which falsely and unconstitutionally concluded that petitioner *must preach* pluralism among religions. The command also believed that petitioner must preach pluralism among religions, as shown on a comment on Petitioner's fitness report, "Removed from his pulpit for failure to preach pluralism among religions." This erroneous belief motivated the command impermissibly to encourage the command chaplain to continue his illegal harassment and bias against Petitioner which led to his sending further emails defending his rights. This erroneous belief also motivated the command to characterize previous emails as disrespectful, and to produce untimely unauthorized (and unsubstantiated) absence charges from the command chaplain's secret, erroneous file, unknown to Petitioner.

The Court of Appeals and the District Court also ignored the impact of the Naval Inspector General's (NIG) failure to adequately examine the EEO complaint and its resultant illegal conclusion, upon which the Secretary of the Navy relied in refusing to allow Petitioner to withdraw his

resignation. The Department of Defense had directed such review and raised doubts as to the EEO's validity. A-16 n.5. It is obvious that had the NIG done its job and applied § 6031, it would have had to come to the conclusion that the EEO report was erroneous, and that all the actions against Petitioner that followed were retaliation because those adverse actions against Petitioner sprung from that report.

The underlying action involves a dispute between a Catholic senior chaplain and Petitioner, the senior Protestant chaplain but junior in rank to the senior, over the junior chaplain's sermons which the Catholic chaplain did not like. A series of e-mails between these two chaplains ensued. When petitioner filed an EEO complaint asking whether a Catholic command chaplain could censor his sermons to his Protestant congregation, the EEO investigator concluded Petitioner had failed to comply with a Navy doctrine called "pluralism", which meant that a chaplain's sermon could not offend anyone in the audience. In making his report, the EEO investigator ignored 10 U.S.C. § 6031 which specifically states that a chaplain "may conduct public worship according to the norms and customs of the church of which he is a member" and Navy Regulation 0817 which implements § 6031, "Chaplains shall be permitted to conduct public worship according to the manner and forms of the church of which they are members". There was no dispute that Petitioner's sermons were in accord with the norms and customs of his church and with general Protestant beliefs, yet the EEO investigator found they violated pluralism because someone could be offended in the congregation. A subsequent investigation by the Navy Inspector General (NIG) also concluded that Petitioner's sermons violated pluralism and that the EEO investigator's report was correct. The NIG also ignored § 6031 and NR 0817.

The basic nature of the issues surrounding § 6031 are also shown in the Navy's treatment of e-mails between Petitioner and his command chaplain. They addressed religious topics such as sermons and preaching, *e.g.*, Petitioner asked for clarification of the Catholic chaplain's comments about Petitioner's sermons being anti-priest. A-28. And although they were between two different denominational representatives with fundamentally opposite denominational perspectives, the fact Petitioner objected to censorship was considered disrespect, although Petitioner was merely exercising the right § 6031 provided him. The e-mails have no vulgar language nor directly communicate disrespect, merely disagreement.

The governmental misconduct in this case increased when Petitioner requested an equal opportunity investigation to determine whether his command chaplain could censor his sermons. The EEO investigator concluded the command chaplain could because Petitioner was not preaching according to a mandatory Navy religious doctrine the investigator defined as "pluralism", which he explained as preaching in a manner that would not offend anyone, regardless of faith perspective, who might be in the congregation.

The EEO investigator's report to the command included an e-mail between Petitioner and the command chaplain over the sermons, and the command concluded that petitioner was disrespectful because as a junior officer he challenged the command chaplain' attempt to censor his sermons.

Another exchange of e-mails concerning religious issues in which Petitioner objected to continued maltreatment and disrespect by the command chaplain led the command to bring disciplinary charges against petitioner for disrespect to his command chaplain. After this decision, the command chaplain also alleged that petitioner had missed some formations months before - events which had never before been mentioned but which the Command included in its disciplinary charges.

Petitioner declined non-judicial punishment, insisting on court-martial, and then, at the suggestion of the command's JAG, submitted his resignation, after which the charges were withdrawn. Petitioner then filed an Inspector General's complaint asking for an investigation of the actions taken against him following his filing of his EEO complaint and review of the EEO investigator's conclusion concerning pluralism. The Department of Defense specifically directed the NIG to investigate the validity of the EEO investigator's conclusions concerning pluralism. With the acceptance of his complaint, Petitioner requested the Secretary of Navy allow him to withdraw his resignation. The Secretary suspended the resignation until the NIG completed its task.

The NIG ignored § 6031, NR 0817, and concluded the EEO report was correct because it believed Petitioner had to preach pluralism and had not. Because it ignored the obvious implications of censorship of Petitioner's sermons, and the legality of the EEO investigator's report, the NIG concluded Petitioner's problems, which stemmed from the EEO report, were the result of his own misconduct. After the NIG issued its report, the Secretary discharged Petitioner.

Petitioner challenged in the courts below the voluntariness of his resignation as a Navy chaplain. He claims the resignation was coerced because (1) the EEO Report forming the source and basis for the command's disciplinary action against him was based on illegal findings that he must preach "pluralism" among religions, a Navy religious doctrine and requirement the command believed was mandated by the Navy, and he was disrespectful for objecting to the command chaplain's attempt to impose pluralism on his sermons; (2) those findings violate the Constitution, 10 U.S.C. § 6031, and Navy regulations; (3) the command's subsequent disciplinary action based on the EEO report's legal conclusion was illegal retaliation and coercion; (4) the resulting NIG report failed to consider 10 U.S.C. § 6031 and regulatory protections for chaplains conducting worship services; (5) his Judge Advocate General (JAG) legal counsel failed to inform him of the only relevant case addressing whether a chaplain could be a superior commissioned officer under Article 89; and (6) the Navy created a culture of religious prejudice that led to a constructive discharge.

During discovery, both the EEO and NIG investigators admitted they were clueless about § 6031 and NR 0817, did not consider the statute or regulation, but claimed they would have made no difference in the report's conclusions. Petitioner's Commanding Officer was familiar with both the statute and regulation but testified that he could censor a chaplain's sermons. Although he had not reviewed Petitioner's sermons, the Commanding Officer nevertheless found them offensive because they violated pluralism. The record shows the Commander's JAG also

concluded Petitioner's preaching violated the Navy's doctrine of pluralism.

After discovery, both sides filed for summary judgment. The District Court granted Respondents' summary judgment, found Petitioner's resignation was voluntary, and dismissed the case. Petitioner appealed to the Court of Appeals for the District of Columbia which denied his appeal on November 28, 2006.

REASONS FOR GRANTING THE WRIT

Petitioner's fitness report states: "Removed from his pulpit for failure to preach pluralism among religions." Absent this Court's review, this case will be a precedent for courts to disregard gross governmental misconduct in military cases. It will also be a precedent for allowing and tacitly approving the repression of free exercise in the military depending on the whim and religion of the command chaplain or commander.

For eight years the military and the lower courts have turned a blind eye to the suppression of the free exercise of Protestant evangelicals on American military bases in and around Naples, Italy. Petitioner's Catholic command chaplain was entrusted with government power to provide for the free exercise of all faiths. Instead, the facts of the case demonstrate that he created and maintained a hostile and intimidating environment in Protestant chapel congregations. The facts show he attempted to subvert their free exercise by forcing Petitioner to preach a religious doctrine called pluralism among religions to his Protestant congregation. Rather than reject the idea that a Navy official can dictate what a chaplain can preach, or a Catholic may

determine what is best for a Protestant evangelical congregation, the Navy defends both the Commander's determination Petitioner was required to preach pluralism and his subsequent decision to punish Petitioner for defending his rights. The lower courts impermissibly avoided coming to grips with the effect of the gross governmental misconduct in this case. Without the governmental misconduct which repressed Petitioner, his congregation and his community, he would have not have been removed from his ministry and career.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Courts Are Not to Participate in or Sanction Governmental Misconduct.

In *Sorrells v. United States*, 287 U.S. 435 (1932), this Court overturned the conviction of a man who had been entrapped by government officials. The Court held that government action should not incite violations of the law. *Id.* at 448, 451. Subsequent decisions have expressed the idea that courts should not close their eyes when government conduct "falls below standards ... for the proper use of governmental power." *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J. concurring). This Court has required law enforcement officials to "respect certain decencies of civilized conduct" while rejecting actions that "offend a sense of justice." *Rochin v. California*, 342 U.S. 165, 173 (1952) (citing *Brown v. State of Mississippi*, 297 U.S. 278, 285-86 (1936)). *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) rejected the idea that officers "in the name of law enforcement itself" could suspend the law. This was because "judicial integrity" was "so necessary in the true administration of justice." *Id.*

As the Court noted in *United States v. Russell*, 411 U.S. 423, 430 (1973), "the principal reason behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.'" (citing *Mapp v. Ohio*, 367 U.S. at 659).

These cases indicate the courts cannot become a participant in or sanction gross governmental misconduct. They reflect the principle expressed in Mr. Justice Brandeis oft quoted dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." These were criminal cases and expressed concern for due process of law.

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of or judicial process. *See* Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Rochin, 342 U.S. 170-71.

The question Petitioner raises is whether these same principles that preclude the courts from shutting their eyes to obnoxious violations of the law in the criminal context also apply in this case. If the fruit of a poisonous tree allows a criminal to escape conviction, can courts close their eyes and ears to open and notorious governmental misconduct that results in an unaddressed adverse action against the victim of the government misconduct? The underlying action which led to Petitioner's resignation stems from government violations of a clear statutory right to preach according to the customs of his church. Petitioner's objections to these violations, which came to his command's attention only because he sought to protect that right by asking for an EEO investigation, form the basis for the command's subsequent disciplinary action for "disrespect." The EO investigator concluded Petitioner violated a Navy doctrine called "pluralism" which required Petitioner to preach in a manner that would offend no one, real or potential, in his congregation. The record is clear that the command not only adopted the EO investigator's conclusion, but earnestly believed that it could evaluate a chaplain's sermon and censor it if it was not pluralistic. Petitioner's fitness report states: "removed from his pulpit for failure to preach pluralism." This raises obvious Establishment, Free Exercise and Free Speech issues. Indeed, Congress had already decided in 10 U.S.C. § 6031 that chaplains could "conduct public worship according to the norms and customs of the church of which they are a member."

Petitioner has been rebuffed at every level at which he sought a decision on the question of whether the Navy may censor his sermons and take action against him because of his defense of the right the statute provided. The EEO

and the NIG investigators both ignored § 6031 and its obvious controlling impact when they investigated whether (1) a command chaplain could censor a junior chaplain's sermons and (2) the junior chaplain was required to preach pluralism among religions to a congregation that rejected such a belief. The lower courts deftly sidestepped this issue. Although the Court of Appeals specifically acknowledged "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse 'pluralism' in their religious practices," A-5, it totally ignored the fact that Congress had already spoken on the issue. Although Petitioner pointed out to the Court of Appeals this Court's precedents likewise addressed this question and have held that the government has no business evaluating a sermon or prayer, *e.g.*, *Fowler v. State of R.I.*, 345 U.S. 67, 69-70 (1953), he also emphasized that § 6031 addressed the issue and, in the context of the investigations, should have been an essential consideration because it was determinative of the issue. Petitioner had a right to preach in accord with the customs and doctrine of his church, which he did. The command chaplain's attempt to insert himself or place himself in the position of Petitioner's ecclesiastical authority is a violation of Petitioner's right under § 6031, not to mention the Constitution.

Petitioner argued the obvious at every level: Respondents had ignored the law and their own regulations. If § 6031 had been applied, the command chaplain would have been guilty of breaking the law. Petitioner's e-mails in defense of his right would be just that, evidence of defense. The command chaplain's actions in continuing to impose his own view of a proper sermon would be *ultra vires*, and would preclude the Navy from retaliating against Petitioner.

Additionally, the command's actions against Petitioner would have been retaliation, because all of those actions have their origin and source in the illegal and incompetent EEO report. This combination of gross indifference to a statute that specifically addressed Petitioner's conduct at issue and his defense of his rights constitute the same sort of gross governmental misconduct this Court found objectionable in *Sorrells, Mapp,* and *Rochin.* The question before the Court is whether the Court of Appeals had the obligation in a civil matter not to sanction what can aptly be described as gross governmental misconduct.

Petitioner's claim of governmental misconduct was before the lower courts. Resolution of that issue would have resolved all other issues in Petitioner's favor. Instead the courts sidestepped the issue. The Court of Appeals was technically correct when it said the EEO report did not result in Veitch's resignation. A-8. However, it is clear that the EEO report began a series of events that lead to that resignation and formed the basis for all of the command's adverse action against Petitioner culminating in his resignation. If this were a criminal case, all the fruit from the poison tree would be excluded. Here the tree was ignored and the fruit was blessed with judicial approval.

The NIG's failure to adequately and properly conduct this investigation into the EEO report is another example of gross governmental misconduct. There can be no other description for its failure to address the statutory and regulatory basis which was determinative of the issue before it, *i.e.* whether a senior Catholic chaplain could direct a junior Protestant chaplain what he should preach to his Protestant congregation.

The Court of Appeals ignored the fact that the NIG's failure to address the basic issue deprived the Secretary of critical information while he was deciding whether to allow Petitioner to withdraw his resignation. It is unreasonable to conclude that the Secretary would have refused Petitioner's resignation withdrawal request if the NIG done its duty and cast Petitioner as a victim and the command chaplain as a perpetrator. This is the only conclusion that can be drawn from the proper application of § 6031 to the facts concerning Petitioner's sermons and the command chaplain's attempts to censor them.

B. Courts Have a Duty to Carefully Examine Establishment Clause Claims

"What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertain whether it furthers any of the evils against which that Clause protects." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772 (1973); *County of Allegheny v. ACLU*, 492 U.S. 593, 609 (1989) (explaining court's duty of "unwavering vigilance" against Establishment Clause violations).

The Court of Appeals clearly recognized that Petitioner raised Establishment Clause claims. "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices." A-5. Although § 6031 provides the clear answer, Petitioner's appeal raised specific Establishment Clause issues that flow from the underlying dispute. These concern the emails between Petitioner and his command chaplain. They were

private and in almost all cases addressed religious issues such as sermons and differences in theological perspectives.

The command chaplain never brought these e-mails to the command's attention, nor did he ever express concern that they were disrespectful or violated any rules of decorum. As the senior chaplain he had an obligation to inform and counsel the junior chaplain on any and all deficiencies. He never did this. The command only became aware of those e-mails because of the EEO investigation which included one e-mail. It is obvious that both chaplains considered these e-mails to be a discussion of religious issues between two clergy with conflicting theological viewpoints and positions. The precedents of this Court are clear that the government must be neutral in matters of religion and may not take sides in religious disputes. *E.g., Larsen v. Valente*, 456 U.S. 228, 244 (1982). Because of the essential religious nature of these e-mails, the Navy's actions subsequent to the illegal EEO report in effect show that it has taken sides. The Navy has established that a senior chaplain's opinion on a sermon is the same as law and the junior chaplain's duty is to salute and say "Aye, aye, Sir" regardless of whether it offends the junior chaplain's beliefs, the doctrines of his church, or his congregation. This also is gross governmental misconduct which the Court of Appeals had an obligation to examine and address.

The Department of Defense Instruction 1304.28 "Guidance for The Appointment of Chaplains for the Military Departments" defines chaplains as denominational representatives. This Court's precedents have clearly established that the government may not direct a religious organization how to pray or conduct its services. The Establishment Clause forbids the Navy establishing any

such doctrine is "pluralism among religions" or taking sides in religious disputes, and this includes censoring, directing or evaluating sermon content. *See, e.g., Fowler*, 345 U.S. at 69-70; *Lee v. Weisman*, 505 U.S. 577, 589-90 (1992). To allow a government official to do so results in the forbidden fusion of government and religious power. *Bd. of Education of Kiryas Joel v. Grummet*, 512 U.S. 657, 658-99 (1994), and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982).

The Court of Appeals recognized that it was faced with Establishment Clause issues. "Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices." A-5. Although there was an obvious statutory violation for addressed the relevant question whether the Navy's actions concerning his sermons were legal, *i.e.*, § 6031, the Court of Appeals ignored its responsibilities to both address the obvious statutory violation and the constitutional implications.

II. THE DECISION BELOW UNDERMINES IMPORTANT NATIONAL POLICY

A. The Decision Encourages the Politicization of Religion

The Court has consistently warned against the fusion of government and religious functions, *Larkin*, 459 U.S. at 126, and the resulting "political fragmentation on sectarian grounds". *Larson v. Valente*, 456 U.S. 228, 252-53 (1982). Here, the Navy has assumed the forbidden power to censor a chaplain's sermons and abridge free exercise.

B, this Decision Effectively Authorizes the Establishment of an Official Navy Religion of "Pluralism"

This Court's precedents are crystal clear that the government may not establish a religion. *Wallace v. Jaffre*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 576 (1987). In effect, this decision places the judiciary's imprimatur on the establishment of an official Navy religion called pluralism. Rather than denounce any implication resulting from the EEO investigator's report and the commander's basis for removing Petitioner from his pulpit, *i.e.*, "for failure to preach pluralism among religions", the Navy has defended this decision at every level. Unfortunately, the courts have winked at or ignored the obvious implications of allowing this unprecedented litigation position to stand, that Navy officials may determine the content of the chaplain's sermons insisting they must be in accord with the official Navy religion of pluralism among religions. Does this Court mean to allow the Armed Forces to establish their own religions?

III. THIS CASE RAISES FUNDAMENTAL FIRST AMENDMENT ISSUES OF FIRST IMPRESSION

This chaplain case stands at the intersection of the Free Exercise, Free Speech and Establishment Clauses. This Court has rejected the idea that the government may regulate religious speech based on the heckler's veto. *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2201). This Court has often cited military chaplains as examples of the accommodation available in the Constitution and the "play in the joints" of these two clauses. *See School Board of Abbington Township v. Shempp*, 374 U.S. 203,296-98 (1963)

(Brennan, J. concurring, citing chaplains as accommodation necessary to provide for the free exercise of religion by military personnel). The underlying issue posed by this petition is whether the judiciary will ignore the principles underlying *Sorrells, Mapp* and *Rochin* and allow the Navy to cast off its moorings to the rule of law and the Constitution and set its own course independent of law and judicial accountability.

CONCLUSION

For all the above reasons, the Court should grant this Petition for Certiorari.

Respectfully Submitted,

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No. _____

In The Supreme Court of the United States

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THE HONORABLE GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 15, 2006 Decided November 28, 2006

No. 05-5196

D. PHILIP VEITCH, REV.,
APPELLANT

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 00cv02982)

Arthur A. Schulcz, Sr. argued the cause and filed the briefs for appellant.

Lowell V. Sturgill, Jr., Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, U.S. Department of Justice, *Kenneth L. Wainstein*, U.S. Attorney at the time the brief was filed, and *Robert M. Loeb*, Attorney.

Before: SENTELLE and ROGERS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Concurring opinion for the Court filed by *Circuit Judge* ROGERS.

SILBERMAN, *Senior Circuit Judge*: Rev. D. Philip Veitch, formerly a Lieutenant Commander in the Navy Chaplain Corps, appeals from the district court's grant of summary judgment to the Navy. His complaint alleged that he had been constructively discharged for unconstitutional reasons; that the Navy had forced him out of the service in violation of his First Amendment rights to free speech and free exercise of religion and in contravention of the Establishment Clause. The district court concluded that since Veitch had resigned voluntarily, he lacked standing to bring his constitutional claims. We affirm.

I

Veitch is an evangelical Protestant minister in the Reformed Episcopal Church. He joined the Navy Chaplain Corps in 1987 and from June 1987 until September 2000 served in the Corps as a commissioned officer, ultimately reaching the rank of Lieutenant Commander. This case has its origin in a recurrent dispute that took place between Rev. Veitch and his command chaplain, Captain Ronald J. Buchmiller, during Veitch's assignment to the Naval Support Activity, Naples, Italy ("NSA Naples").

Essentially, Veitch claims that Captain Buchmiller, a Catholic priest, clashed with him because of Buchmiller's intolerance for Veitch's conservative Protestant religious beliefs and practices. There seems to be little doubt that the relationship between the two was quite unfriendly, and, according to Veitch, Buchmiller repeatedly criticized him for his insistence on preaching *sola scriptura*—the doctrine that Biblical teaching alone is authoritative, which is accepted by many Protestant faiths but rejected by Catholic and Orthodox churches. Continued friction led Veitch to send rather caustic emails to Buchmiller and to file an Equal Opportunity Complaint ("EO Complaint") seeking relief from Buchmiller's harassment.

Commander Lawrence Zoeller, a medical service officer, was assigned to investigate Veitch's complaint. Zoeller concluded that Veitch's allegation of religious discrimination was unsubstantiated. In explaining his decision to recommend denying Veitch's complaint, Zoeller described what he perceived to be the Navy's requirement of pluralism among religions. Zoeller determined that Veitch had failed to satisfy the basic tenet of pluralism in his preaching, and that Buchmiller had been correct to counsel Veitch on this problem. Zoeller also found that Veitch's preaching was derogatory toward other faiths. Zoeller transmitted his report to Captain John J. Coyne, the commanding officer at NSA Naples. After reviewing Zoeller's report along with some of the e-mails sent from Veitch to Buchmiller, Coyne contacted Buchmiller to inform him that Veitch's behavior, as evidenced by his e-mails, demonstrated an unacceptable lack of respect for a superior officer and should not be tolerated in the future.

Thereafter, Veitch claims that Buchmiller tore a Reformation Conference poster off his wall and continued to harass and criticize him. Veitch claims that he was on the verge of filing a second EO Complaint in response to Buchmiller's continued hostility. In the end, Veitch chose not to file, but he did send Buchmiller a fateful e-mail on February 8, 1999. Veitch's rebarbative missive was a four-page broadside attack on Buchmiller's command and character. This e-mail prompted Coyne to bring non-judicial punishment against Veitch in the form of a Captain's Mast. Veitch was presented with a charge sheet in February; he was charged with "disrespect towards a superior commissioned officer" under Article 89 of the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. § 889 (2000). He was also charged under Article 86 of the UCMJ with "failure to go to appointed place of duty," 10 U.S.C. § 886, for having missed four staff meetings, without justification, in late 1998. Veitch consulted with his Navy attorney and refused nonjudicial punishment. Coyne then decided to bring the same charges against Veitch at court-martial.

After further consultation with counsel, Veitch submitted his resignation, which Coyne endorsed. Coyne did not further pursue the court-martial charges, but instead issued Veitch a Nonpunitive Letter of Caution. In April 1999, Veitch wrote to the Department of Defense Inspector General ("DoDIG") alleging that Coyne and Buchmiller had engaged in acts of reprisal for his decision to file the EO Complaint; he requested that the DoDIG investigate the circumstances surrounding his resignation. In May, the Navy approved Veitch's resignation and set a November separation date. However, in July, when the DoDIG agreed to investigate Veitch's complaint through the Navy Inspector General ("NIG"), Veitch requested permission to withdraw his

resignation. Veitch's new commanding officer, Captain Brendan L. Gray, strongly recommended disapproval of Veitch's request, and the Navy denied his request in August 1999. But in early November, the Secretary of the Navy suspended Veitch's resignation orders until the completion of the NIG investigation into Veitch's retaliation complaint. On May 23, 2000, the NIG completed its report, which found that Veitch's allegations of reprisal were unsupported. With the retaliation inquiry complete, Veitch was finally separated from the Navy on September 30, 2000.

Veitch then sued the Navy and several of its officers in federal district court in December 2000. Veitch included with his complaint a motion for a preliminary injunction. The district court denied Veitch's motion. *See Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001). Defendants then filed a motion to dismiss, which was granted in part and denied in part. The court also ordered Veitch to file an amended complaint or face dismissal of his entire case. *See Veitch v. Danzig*, Civ. No. 00-2982 (D.D.C. Aug. 30, 2001) (memorandum and order). Veitch then filed a six-count amended complaint alleging Free Speech, Establishment, and Free Exercise claims; Fifth Amendment claims; claims for constructive discharge; and violations of the Religious Freedom Restoration Act ("RFRA"). The district court granted summary judgment for defendants.

II

Veitch would have us confront a rather troubling constitutional question: whether chaplains in the armed services can be required to endorse "pluralism" in their religious practices. The services are understandably concerned about unit morale. And those of us old enough to

remember World War II movies will recall scenes of chaplains at the front line performing services for soldiers of different religions. On the other hand, Veitch's argument that a chaplain cannot be obliged to preach counter to his or her religious beliefs consistent with the First Amendment is hardly a frivolous claim. Fortunately for us—and unfortunately for Veitch—we need not decide this difficult question. We agree with the district court that Veitch may not raise this issue because his resignation was voluntary and because the Navy did not act unreasonably in refusing to permit Veitch to withdraw his resignation.

Veitch contends that we are obliged to consider his constitutional challenges because the Navy's alleged unlawful behavior coerced Veitch into offering his resignation; in other words, he alleges that he was constructively discharged. Veitch's pleadings never really indicate the source of his cause of action. At oral argument, Veitch's counsel asserted that his claim and request for injunctive relief—the reinstatement of his status—was based on the Constitution itself. The government did not object to appellant's imprecision in his pleadings, nor did it deny that a claim for constructive discharge could be brought against the government directly under the Constitution.[1] The government insisted instead that Veitch's resignation was wholly voluntary. In light of the parties' posture, we shall assume, *arguendo*, that if the government illegally coerced an officer to resign, a constructive discharge claim could be brought.[2] Although we have found no cases that explicitly discuss such a claim, there are, of course, quite a number of constructive discharge cases that arise in the Title VII context. *See generally Penn. State Police v. Suders*, 542 U.S. 129, 142-43 (2004). To be sure, Veitch does not purport to be raising a claim under Title VII, and although this Court has

not squarely ruled on the question, we note that every circuit to address the issue has held Title VII inapplicable to uniformed members of the armed services. *See, e.g., Fisher v. Peters*, 249 F.3d 433, 438 (6th Cir. 2001); *Brown v. United States*, 227 F.2d 29, 298 (5th Cir. 2000); *Hodge v. Dalton*, 107 F.3d 705, 707-12 (9th Cir.

1997); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1994); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir. 1978); *see also Collins v. Sec'y of the Navy*, 814 F. Supp. 130, 131 (D.D.C. 1993).[3] Nevertheless, Title VII cases provide standards by which to judge constructive discharge claims, and the district court relied on them, in part, to determine that Veitch's resignation was voluntary. While a constitutional claim for constructive discharge might not track the standards used to decide Title VII cases, we think it likely that actions that did not amount to a constructive discharge under Title VII would not violate an employee's constitutional protections.

Veitch's constructive discharge claim rests on four elements. The first, and by far the most important according

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1. Presumably the waiver of sovereign immunity for such a direct action against the Navy—as opposed to the individual defendants—would come from the Administrative Procedure Act, 5 U.S.C. § 702.

2. The existence *vel non* of a cause of action is not a jurisdictional question, and therefore we may assume it without deciding. *Trudeau v. Fed'l Trade Comm'n*, 456 F.3d 178, 190-91 (D.C. Cir. 2006).

to appellant, is the Zoeller Report. Veitch focuses so heavily on the Report because it is the only document in this case that both defines the doctrine of pluralism and acknowledges that the Navy Chaplain Corps requires its chaplains to preach pluralistically. According to Veitch, the Zoeller Report's unconstitutional conclusions made his resignation the product of duress, which fact thus vitiates the voluntariness of his choice and entitles him to reinstatement. There are longstanding precedents in the Federal Circuit holding that resignations produced by unlawful government duress or coercion are invalid. *See, e.g., Carmichael v. United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2000). The test for duress is objective, and has three parts: Under a reasonable person standard, Veitch must show "(1) he involuntarily accepted the terms of the government; (2) circumstances permitted no other alternative; (3) said circumstances were the result of the government's coercive acts." *Id.* Veitch's difficulty is that the Zoeller Report in no sense punished or threatened him; it simply rejected his EO Complaint against Buchmiller. That Zoeller's nonbinding legal conclusions were not "coercive acts" seems obvious.

Veitch's argument seems to be that if the Navy's actions against him—e.g., the dismissal of his EO Complaint—were unlawful, then they were *per se* coercive, whether or not those actions would actually force a

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3. The Equal Employment Opportunity Commission agrees with the circuits that have decided this issue. *See* 29 C.F.R. § 1614.103(d)(1) (2006) (excluding uniformed members of the military departments from Title VII's anti-discrimination provisions).

reasonable person in Veitch's position to resign. For this extraordinary proposition, Veitch relies on one Court of Claims case, *Roskos v. United States*, 549 F.2d 1386 (Cl. Ct. 1977), in which the court said, "An action is not voluntary if it is *produced* by government action which is wrongful." *Id.* at 1389-90 (emphasis added). But in that case, the illegal act was the unauthorized transfer of the plaintiff to another city, which the court described as one that "[left] the employee with no practicable alternative [but to resign]." Thus, *Roskos*, far from announcing a new standard for challenges to government action, is entirely consistent with the Federal Circuit's tripartite duress test. The *Roskos* court simply found that "circumstances permitted no other alternative." *Carmichael*, 298 F.3d at 1372. It can hardly be claimed that the Zoeller Report left Veitch with no practical alternative but resignation. Indeed, Veitch could have appealed the results of Zoeller's investigation, but chose not to do so. Veitch thus had a "reasonable alternative" to resignation that negates the second duress requirement. *See Kim v. United States*, 47 Fed. Cl. 493, 497-98 (2000).

The second and third elements in Veitch's constructive discharge claim relate to the court-martial charges brought against him. It will be recalled that he was charged, *inter alia*, with disrespect to a superior officer under Article 89 of the UCMJ. Here Veitch raises a rather subtle argument, relying on a district court opinion in our circuit, *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), for the proposition that military chaplains cannot be "superior commissioned officers" as that term is used in 10 U.S.C. § 889, and so the Article 89 charge against him was improper. But *Rigdon* did not deal with actions alleged to be disrespectful to a superior officer, and whether or not it is a sound interpretation of the UCMJ, nothing prevented Veitch

from contesting his court-martial on that or any other ground.

A court-martialed serviceman or woman has a congressionally enacted process of military appeals by which to contest allegedly unlawful charges. And this process, notably, does not include immediate resort to the federal courts. For instance, after a conviction, the accused has right to review of his or her sentence by the court-martial's convening authority, and, following that, by the Navy Judge Advocate General. *See generally* 10 U.S.C. §§ 859-67. In certain circumstances—including those involving sentences of dismissal or discharge—a serviceman or woman has a right of appeal to the United States Navy-Marine Corps Court of Criminal Appeals, and, by petition, to the United States Court of Appeals for the Armed Forces.[4] *Id.* Congress thus carefully designed a scheme of military appeals to prevent needless federal court review of military affairs. By resigning in the face of his court-martial charges, however, Veitch neglected to exhaust his military court remedies. *See Parisi v. Davidson*, 450 U.S. 34, 41-46 (1972)

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4. On all but rare occasions, the accused may obtain a writ of habeas corpus only *after* progressing through the appellate hierarchy of military courts. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted."). The one major exception to the general rule requiring exhaustion of military court remedies prior to obtaining habeas relief involves cases where military courts are claimed to lack jurisdiction over the accused. In such cases, collateral attack is allowed prior to the conclusion of military court proceedings. *See id.* at 746-53.

(recognizing the exhaustion requirement applied to courts-martial when the accused could gain complete relief before such tribunals). Veitch cannot now escape the consequences of that decision by characterizing the courtmartial charges themselves as evidence of coercion. Successfully contesting the court-martial would have provided Veitch full relief from the allegedly unlawful charge under Article 89, and when full relief is available from a court-martial, civilian courts should require resort to that tribunal in the first instance.

Veitch also claims that his appointed counsel led him astray by not telling him about *Rigdon* and the possible defense to the court-martial that case provided. He relies chiefly on *Tippett v.United States*, 185 F.3d 1250 (Fed Cir. 1999), in which our neighbor court held that an Army captain's discharge was not voluntary if based on his Army lawyer's misrepresentation of his legal rights, *id.* at 1258. Veitch never fully develops his assertion that his Navy lawyer's failure to bring *Rigdon* to his attention was a causal factor in his decision to resign. In *Tippett*, it was essentially uncontested that the plaintiff had based his decision to resign on his military lawyer's advice as to the effect his resignation would have on his subsequent intent to apply for a reserve commission. On the record before us, there is nothing to support a conclusion that Veitch resigned because of his lawyer's failure to discover favorable legal precedent, which, in this case, amounted to a single district court decision that is not binding precedent for any other court. Such a conclusion is further undercut by the fact that Veitch's Navy lawyer had the case for two days prior to Veitch's resignation. Moreover, Veitch was charged not only with an Article 89 offense, but also with an Article 86 violation (failure to appear at an appointed place of duty)

and *Rigdon*, even if correctly decided (which we doubt), has no bearing on that charge.

Finally, Veitch asserts, relying on an analogy with Title VII cases holding that a hostile work environment can be the cause of a constructive discharge, that he faced just such a hostile environment at NSA Naples. As already noted, we assume, *arguendo*, that Veitch may raise a constructive discharge claim directly under the Constitution, but whether or not that is so, such a claim could not require *less* of a showing than would qualify under Title VII itself. The district court concluded that Veitch had not presented a triable issue of fact on the question of intolerable work conditions. On appeal, Veitch argues that the district court ignored evidence of a hostile work environment and failed to give Veitch the inferences to which he is entitled as the nonmoving party on a motion for summary judgment. We are by no means convinced that the district court erred in its evaluation of the evidence; however, we do not believe it necessary to resolve these questions because, viewing the record in the light most favorable to Veitch, his claims fail to make out a hostile work environment as a matter of law.

We have held that a plaintiff bringing an employment discrimination claim under Title VII on the theory of "constructive discharge" must show that the employer deliberately created intolerable work conditions that forced the plaintiff to quit. *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981). "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141 (citing C. Geoffrey Weirich et al., *2002 Cumulative Supplement to Lindemann & Grossman* 651-52 & n.1). We have stated before that the mere existence of

workplace discrimination is insufficient to make out a constructive discharge claim; "[c]onstructive discharge . . . requires a finding of discrimination *and* the existence of certain 'aggravating factors.'" *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997) (quoting *Clark*, 665 F.2d at 1174) (emphasis added). "Aggravating factors" are those aspects of a discriminatory work environment that, by making the workplace so disagreeable, prevent the reasonable employee from seeking remediation on the job. *Id.* (citing *Clark*, 665 F.2d at 1174).

The question before us is whether the record reveals any aggravating factors that could give rise to a constructive discharge. Veitch makes various claims of harassment and discrimination by Buchmiller: Buchmiller stated twice that Veitch would "not be doing much" in Naples; Buchmiller did not assign Veitch collateral duties during his first thirteen months in Italy; Buchmiller repeatedly criticized Veitch's sermons; Veitch was forced to share a cramped office with a junior chaplain; Buchmiller denied Veitch the role and responsibilities of senior Protestant chaplain; Buchmiller did not speak to Veitch during staff meetings; Buchmiller assigned Veitch to assist a junior chaplain in the Vacation Bible School; Buchmiller tore a Reformation Conference poster off Veitch's wall; Veitch was assigned to pastor the "Maranatha" worship service, to which Veitch's conservative liturgical tradition was inimical; Buchmiller spoke to Veitch in a "curt" manner. Veitch further argues that there was a general anti-evangelical environment at NSA Naples that contributed to the intolerable work conditions created by Buchmiller.

Accepting these assertions as true, we conclude that, as a matter of law, they do not constitute "aggravating

factors" under our Title VII precedents. In the context of gender discrimination, the Supreme Court has stated that "to establish hostile work environment, plaintiffs . . . must show harassing behavior 'sufficiently severe or pervasive to alter the conditions of [their] employment.'" *Suders*, 542 U.S. at 133 (quoting *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

Surely the "severe and pervasive" requirement applies equally to the evaluation of "aggravating factors" in cases alleging religious discrimination. Here Veitch does not claim conduct sufficiently "severe and pervasive" to create an aggravated work environment in which an employee had no choice but to resign.

Most of Veitch's grievances—e.g., nonselection as senior protestant chaplain, assignment to the "Maranatha" worship service, assignment to work with a junior chaplain, lack of collateral duties, sharing a small office with another chaplain, criticism from Buchmiller—have explicitly been rejected as "aggravating factors." *See* Weirich et al., *supra*, at 663-64 ("Generally, a failure to promote will not constitute constructive discharge, nor will a change in job duties, a transfer, . . . criticism, pressure from a supervisor, or being ignored by coworkers.") (citations omitted). Veitch's remaining complaint is that Buchmiller tore down his Reformation Conference poster. Such an act, while possibly boorish and unjustified, hardly constitutes the type of harassing behavior that would give rise to a constructive discharge. All of these assertions, if true, may have made Veitch's experience at NSA Naples somewhat frustrating. But they cannot be considered sufficiently "severe" to leave a reasonable employee with no realistic option but to quit his or her job. *Compare, e.g., Singletary v. District of Columbia*, 351

F.3d 519, 528-29 (D.C. Cir. 2003) (remanding to the district court for a finding on the question of hostile work environment when the plaintiff had been forced to work in an unheated, unventilated storage room containing brooms and boxes of debris when more suitable office space was available).

III

Once determining that appellant had voluntarily resigned—a determination we affirm—the district court, following our opinion in *Taylor v. FDIC*, 132 F.3d 753 (D.C. Cir. 1997), held that Veitch lacked standing to pursue his broadside constitutional attack on the Navy Chaplain Corps's pluralism policy. We quite agree with the district court on the assumption that the resignation stands. But appellant also claims that the Navy acted arbitrarily and capriciously in denying his request to withdraw his resignation, an added claim not present in *Taylor*. Veitch argues that the Navy erred by relying on the NIG's conclusions with respect to the Zoeller Report.[5] Although Veitch does not specify, we assume—and the government apparently concedes—that review of the Navy's decision is premised on the Administrative Procedure Act ("APA"). 5 U.S.C. § 704.

There is no doubt that appellant has standing to raise his APA claim even though, as we conclude, his resignation was voluntary. After all, the Secretary of the Navy himself suspended Veitch's resignation order until the completion of the NIG investigation, which suggests that even if his resignation had been legally voluntary, the Navy would have permitted him to withdraw it if the NIG investigation had shown his supervisors acted with retaliatory motive.

Thus, favorable review of the Navy's decision could potentially remedy Veitch's injury. Still, appellant's standing to raise this claim avails him little, for we have no grounds to conclude that the Navy acted unreasonably in refusing his withdrawal request.

Veitch argues that the Zoeller Report infected the Navy's decisionmaking process from start to finish. If the Zoeller Report contained unconstitutional statements about pluralism, then, according to Veitch, it could not serve as a valid basis for the Navy's decision to deny his withdrawal request. But this argument ignores the Navy's entirely independent ground for denying Veitch's request, namely, the finding of no retaliation. The NIG reported that Coyne, Buchmiller, and Gray's actions did not violate the Whistleblower Protection Statute, meaning that Veitch could not point the finger at his commanding officers to explain his disciplinary problems. Thus even if Zoeller's conclusions had been palpably unconstitutional, the fact that there was no retaliation for the EO Complaint means that Veitch's request would still have been denied because his disciplinary troubles were the result of his own misconduct. Veitch offers no reason for us to doubt the verity of the NIG's conclusion about retaliation, let alone disturb such a finding under our limited scope of review. The deference we owe an agency decision under the arbitrary and capricious test precludes our reweighing the factors leading the Navy to deny his request.

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5. As part of the NIG inquiry into collateral issues surrounding Veitch's complaint under the Military Whistleblower Protection Statute, 10 U.S.C. § 1034, the DoDIG instructed the NIG to investigate Veitch's original EO Complaint and Zoeller's findings.

IV

Based on the foregoing, we affirm summary judgment as to all claims.

ROGERS, *Circuit Judge*, concurring: The Navy has never challenged Rev. D. Philip Veitch's lawsuit on the ground that he states no cause of action for constructive discharge. As the court acknowledges, Op. at 6 n.2, the existence of a cause of action in a complaint is not jurisdictional and may be assumed without being decided by the court. *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (citing *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979)). Although courts enjoy discretion to consider non-jurisdictional issues raised for the first time on appeal, *Acree v. Republic of Iraq*, 370 F.3d 41, 58 (D.C. Cir. 2004), no "extraordinary circumstances" exist here as would warrant the court's consideration of the issue. *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). The Navy has never argued in the district court or this court that Rev. Veitch has failed to state a cause of action for constructive discharge. Consequently, the issue has not been briefed by the parties on appeal. Further, during oral argument, when the court raised the issue, counsel for the Navy did not adopt the position that there was no such cause of action.

Because, regardless of the cause of action, the evidence shows that Rev. Veitch voluntarily resigned from the Navy, he lacks standing to bring, and the court lacks jurisdiction to consider, his claim for reinstatement or his equitable claims regarding the conditions of his former employment. *See Taylor v. Fed. Deposit Ins. Corp.*, 132 F.3d

753, 766-68 (D.C. Cir. 1997). Consequently, the court has no occasion to consider the nature of the evidentiary burden, Op. at 6-7, nor whether Rev. Veitch met that evidentiary burden in opposing the Navy's motion for summary judgment to show that the Navy's "pluralism"[1] policy violated his rights under the First and Fifth Amendments; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb; or Navy regulations.

The Navy rightly points out that if Rev. Veitch cannot prove that he was constructively discharged from the Navy, all of his remaining claims, which concern the conditions of his former employment as chaplain and for which he seeks only injunctive and declaratory relief, fail for lack of Article III standing. The Supreme Court has instructed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)) (omission and alteration in original, internal quotation marks omitted). If Rev. Veitch's resignation from the Navy was voluntary, then he has no legal right to reinstatement to his position as a Navy chaplain, and the court cannot grant him the declaratory and injunctive relief he seeks regarding the conditions of his

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1. The Navy's pluralism policy is discussed in the Zoeller Report, *see* Op. at 3, wherein Chaplain Gary Morris, of the United Methodist faith, reported that chaplain trainees "are taught that facilitating other religions and ministries is essential," along with "respect for other differences and traditions of faith especially when [a Navy] chaplain might have a mixed [faith] congregation." Joint Appendix at 649.

prior employment. This court stated in *Bois v.Marsh*, 801 F.2d 462, 466 (D.C. Cir. 1986), that a plaintiff who has voluntarily resigned from the armed forces "stands in the civil courts as a civilian seeking reform of military procedures to which she is no longer subject." To bring this appeal claiming First and Fifth Amendment and statutory violations, therefore, Rev. Veitch must be able to show that his resignation is traceable to the Navy, specifically, on his terms, that he was coerced as a result of retaliation by the Navy for protesting the alleged religious discrimination and statutory violations he suffered. In other words, Rev. Veitch must prove constructive discharge.

This court has declared:

> "[A] constructive discharge occurs where the employer creates or tolerates discriminatory working conditions that would drive a reasonable person to resign." It does not occur when an employee leaves an unpleasant but objectively tolerable job because alternatives have become more attractive, even if the employer's misbehavior creates the unpleasantness...

Taylor, 132 F.3d at 766 (quoting *Katradis v. Dav-El of Wash.*, 846 F.2d 1482, 1485 (D.C. Cir. 1988)) (alteration in original). The question, then, is whether Rev. Veitch has presented evidence from which a reasonable jury could conclude that his resignation was forced by the Navy. Although he is entitled as the non-moving party to the benefit of all reasonable inferences, he cannot rely in opposing summary judgment on mere allegations in his unsworn complaint, much less on assertions made in his brief on appeal; the court may consider only sworn statements setting forth specific facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986);

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292 (D.C. Cir. 1988); FED. R. CIV. P. 56(e).

In *Taylor*, the court considered what constructive discharge requires. The plaintiffs in that case were former employees of the Resolution Trust Corporation ("RTC") who alleged that RTC's successor corporation, the Federal Deposit Insurance Corporation, retaliated against them for making protected disclosures in violation of the RTC Whistleblower Act, 12 U.S.C. § 1441a(q), and the First Amendment. 132 F.3d at 758-59. The court noted that the plaintiffs endured whatever the defendant inflicted upon them until May 1995, when they took advantage of the severance package offered by the Voluntary Separation Incentive Program. The plaintiffs did not suggest that any simultaneous increase in the "wattage of harassment" drove them out. *Id.* at 766. While the court noted that what would drive a reasonable person to resign "may vary with the character of the job for which the employee was hired and thus, indirectly, with the employee's skills," it held that the plaintiffs had presented no triable issue of fact on the question of constructive discharge. *Id.* The court vacated the grant of summary judgment and remanded the case for the district court to dismiss the complaint.

Rev. Veitch similarly claims that his resignation was forced because of past discrimination—which he tolerated while engaging in an exchange of emails with Captain Buchmiller, filing an Equal Opportunity complaint, and considering filing another complaint. Ultimately, however, Rev. Veitch resigned rather than face disciplinary proceedings for his disrespectful emails and unexplained absences. This does not render his resignation involuntary. *See Pitt v. United States*, 420 F.2d 1028, 1032-33 (Ct. Cl. 1970);

Kim v. United States, 47 Fed. Cl. 493, 497-98 (2000). Rev. Veitch presents no evidence to suggest that past discrimination required him to be disrespectful in violation of the Uniform Code of Military Justice as alleged, or, shy of that, that the Captain's Mast or court-martial proceedings would have been so unfair so as to force his resignation. To the contrary, the claims he raises here could have been raised before a Navy tribunal. Op. at 10.

Other courts have agreed that the standard for constructive discharge is quite high. "Resignations or retirements are presumed to be voluntary," *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999), and a party alleging that a facially valid resignation was in fact the product of unlawful duress must prove three elements: (1) one side involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; and (3) the circumstances were the result of coercive acts of the opposite party, *Roskos v. United States*, 549 F.2d 1386, 1389 n.11 (Ct. Cl. 1977); *see also Kim*, 47 Fed. Cl. at 497. Under the standard for summary judgment, Rev. Veitch cannot succeed in showing here that the circumstances permitted no option except resignation from the Navy.

Alternatively, Rev. Veitch contends that the voluntariness of his resignation was vitiated by his attorney's failure to inform him of *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997). This argument strains credulity, for the district court opinion is binding neither on the Navy's understanding of Article 89 of the Code of Military Justice nor on this court.

Article III standing requires the plaintiff to show that his injury is "fairly traceable to the defendant's allegedly

unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984). As the court reasoned in *Taylor*:

> Our rejection of [the plaintiffs'] claim of constructive discharge is concomitantly a decision that their voluntary acts are sufficient independent causes of their separation from the RTC.
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> This is quite consistent with [the plaintiffs'] (theoretically) having a claim against the RTC for its earlier mistreatment. . . . Had [the plaintiffs] remained [employed at the RTC], they might have been entitled to some sort of restoration of their earlier status; having left under circumstances for which the RTC is not legally culpable, however, they cannot claim that the RTC has deprived them of their jobs, even if its prior treatment of them, though falling short of constructive discharge, was actionable. Failing to show causation, they lack standing.

132 F.3d at 767. Had Rev. Veitch pressed his broad attack against the Navy's "pluralism" policy only on constitutional and statutory grounds, the court would lack jurisdiction to hear the case altogether. However, Rev. Veitch also contends that the Navy acted arbitrarily and capriciously in denying his request to withdraw his resignation. Although he has standing to raise this claim, it fails on the merits, *see* Op. at 14-15.

Accordingly, because Rev. Veitch failed to present evidence establishing a material issue of disputed fact as to whether he was constructively discharged from the Navy, nor met his burden to show that the Navy acted

unreasonably in denying his request to withdraw his resignation, I concur in affirming the grant of summary judgment to the Navy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D. PHILIP VEITCH	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-2982
HON. GORDON R. ENGLAND, SECRETARY OF THE NAVY, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

INTRODUCTION

Plaintiff, Rev. D. Philip Veitch, ("Chaplain Veitch," "Rev. Veitch"), a former active-duty Navy chaplain, filed this suit seeking his reinstatement and return to active duty following his separation from the Navy on September 30, 2000. Plaintiff seeks equitable, declaratory, and injunctive relief to protect his rights under the First and Fifth Amendments, the Religious Freedom Restoration Act ("RFRA"), other federal statutes, and the Navy's regulations. Rev. Veitch claims that the Navy persecuted him for his religious faith and practices; censored his religious speech and removed him from his Protestant congregation's pulpit for preaching historic Protestant doctrines; retaliated against him for officially complaining about the deprivation of those

rights; and coerced him into resigning from the Navy. Plaintiff's Complaint includes the following counts: (1) a violation of the First Amendment's free exercise and establishment clauses; (2) a violation of Plaintiff's First Amendment Rights of free speech and illegal retaliation for Plaintiff's filing of an equal opportunity complaint; (3) a violation of equal protection under the Fifth Amendment, alleging, *inter alia*, inconsistent application of the Uniform Code of Military Justice and the Navy's allegedly arbitrary and capricious denial of Plaintiff's request to withdraw his resignation; (4) illegal or constructive discharge due to hostile work conditions, including the threat of a court-martial that created a climate of duress and coercion; (5) a violation of the RFRA; and (6) illegal retaliation in response to Plaintiff's complaint of religious discrimination through the Navy's approved channels. Discovery has been completed and this matter is before the court on cross-motions for summary judgment pursuant to FED. R. CIV. P. 56. The parties have submitted memoranda and exhibits in support of, and in opposition to, the pending motions, including declarations and excerpts from various depositions taken during discovery.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Rev. Veitch is an ordained minister in the Reformed Episcopal Church and was endorsed by his church to become a Navy chaplain. *First Am. Compl.* ¶ 7; *Veitch Dep.* at 346:22-347:1. From June 1997 until September 2000, Plaintiff served as a commissioned officer with the rank of lieutenant commander in the U.S. Navy Chaplain Corps. In December 1997 Plaintiff and his family were assigned to the Naval Support Activity (NSA) in Naples, Italy (hereinafter "Naples"). Plaintiff's wife testified that when the Veitch

family arrived in Naples, Captain Ronald Buchmiller, Chaplain Veitch's new supervisor, told her that her husband would "not be doing much" during his Naples tour of duty. *Sharon Veitch Decl.*, at 3, ¶ 15. The parties disagree whether such a statement was made, and, if so, whether it demonstrated Captain Buchmiller's alleged animus toward Plaintiff or simply meant that Plaintiff would be given time to settle in before receiving more work. *Buchmiller Dep.* at 64-65.

Plaintiff argues that Captain Buchmiller's discriminatory animus originated even prior to his arrival in Naples, when Captain Buchmiller and Plaintiff were both stationed at Norfolk, Virginia. At that time, Plaintiff Veitch considered filing a discrimination complaint against his then supervisor through the Navy's approved grievance channels. According to Plaintiff, Captain Buchmiller warned him that the Chaplain Corps would "end his military career" if he exercised his right to file an equal opportunity complaint. *Veitch Dep.* at 215:13-18. Captain Buchmiller denied that he ever threatened Plaintiff, testifying that he advised Plaintiff against filing a complaint because he was leaving Norfolk for another assignment and it would "end up making [Rev. Veitch] bitter." *Buchmiller Dep.* at 20:7-22. The parties did not make any claims with respect to the underlying facts of that complaint, as Plaintiff refers to the events in Norfolk merely to allege that Captain Buchmiller planned to ruin his Navy career.

According to Plaintiff, Captain Buchmiller, a Roman Catholic priest, Chaplain Steven Pike, an Episcopal chaplain, and Captain John J. Coyne, the commanding officer of the Naval Support Activity in Naples, conspired to create an atmosphere of religious intolerance directed toward

conservative and evangelical Protestants in Naples, including Plaintiff, in part by suggesting that he should preach religious pluralism. *First Am. Compl.* ¶ 14; *Pl. Br. in Supp. Of Opp'n and Cross-Mot. for Summ. J.*, at 45. In support, Plaintiff cites to the testimony of several evangelical Protestants who worked in the Naples chapel describing the chapel climate created by Captain Buchmiller. *See, e.g., Siegfriedt-Wilson Dep.; Bowling Decl.; Corean Decl.; DeMarco Decl.* There are statements in the record before the court that certain evangelical Protestants in the Navy, including chaplains and their spouses, felt "anti-evangelical hostility" from Chaplain Pike and the chapel leadership under Chaplain Buchmiller. *See, e.g., Colon Decl.*, at ¶ 9. Chaplain Siegfriedt-Wilson testified that he left the Naples chapel because he "could not do [his] job" because "the stress was too great . . . [and they] were not wanted." *Siegfriedt-Wilson Dep.* at 63:2-21. Brendajo Bowling, who worked as a pianist for Chaplain Pike in Naples, testified in her declaration that "the atmosphere of fear and hostility toward evangelicals" was "created, controlled and fed by Chaplains Buchmiller and Pike." *Bowling Decl.* ¶ 5. Mary Colon, who was a member of the evangelical congregation at the Navy chapel at the relevant times, stated that in her responsibilities as the Protestant Director of Religious Education, she "witnessed and experienced anti-evangelical hostility from Chaplain Pike and the chapel leadership under Chaplain Buchmiller." *Colon Decl.* ¶ 9. There are no specific descriptions in the record detailing actions or incidents which would demonstrate that the environment in the Navy chapel was hostile and intolerable.

Central to Plaintiff's own experience of religious discrimination is his claim that Captain Buchmiller criticized his sermons and sought to stifle their content. *See, e.g., First*

Am. Compl. ¶ 60; *Veitch Dep.* at 346:6-14. Plaintiff's allegations relate to a sermon he gave on November 8, 1998, which elicited several complaints addressed to Captain Buchmiller. *Veitch Dep.* at 376-77 (describing his sermon as "anti-priest."). The complaints came from chaplains and charged Plaintiff with "speaking ill of other chaplains" and calling them "unregenerate." *Buchmiller Dep.* at 92-93. Although Captain Buchmiller himself did not attend or read Rev. Veitch's sermon, he was compelled to discuss the sermon with Plaintiff in light of those complaints. The parties disagree about what exactly was said at the meeting between Plaintiff and Captain Buchmiller: Plaintiff testified that Captain Buchmiller forbade him to preach "Sola Scriptura," a central tenet of Plaintiff's faith. *Veitch Dep.* at 346. Captain Buchmiller testified that he did not forbid Plaintiff from preaching Sola Scriptura, but instead asked him not to denigrate other chaplains. *Buchmiller Dep.* at 93, 184 ("I told him that I had no problem with Sola Scriptura as long as he was not being divisive and destroying the reputation of the other chaplains." *Id.* at 184.). Following the meeting, Plaintiff sent an e-mail to Captain Buchmiller:

> (1) You will need to be far more specific in your statements about "antipriest." I didn't understand your point. You were pretty emotional and dogmatic. . . .
>
> (2) . . . you should ask before making statements particularly in the emotional tones and in front of RP's. The junior RP's have trouble with the gossip from senior khaki. I have advised you about that. . . .

E-mail from Veitch to Buchmiller, Nov. 12, 1998. This e-mail was followed shortly thereafter by another e-mail to Captain Buchmiller:

> You will have to be "much more" thorough in your counseling to me dtd. 12 Nov. 98. You will need to capture it in writing. If it is not written, it does not exist. . . .
> Your written counsel was distinctively unhelpful due to its vagueness and lack of definition. . . .
> (2) Your comment about "negativity" in the sermon on 8 Nov. 98. You will just have to ask the 70+ people who were there. . . . You will have to be far more explicit and thorough to satisfy my inexorable thirst for truth.
> (3) I am pressing for a return to the old wells of theology. Neither you, any CO [Commanding Officer], or the CNO will quench that. . . . This is the lead reason why I will leave the CHC [Chaplain Corps]. I desire to work alongside those with a similar vision. . . .

E-mail from Veitch to Buchmiller, Nov. 13, 1998, 9:05 a.m. Captain Buchmiller responded to Plaintiff in writing, explaining that "[S]ola [S]criptura is not my problem," and counseling Plaintiff not "to imply that everyone else is wrong" or that "you are the only source of the truth with implications that our other chaplains have no valid theology." *E-mail from Buchmiller to Veitch*, Nov. 13, 1998. Plaintiff replied to Captain Buchmiller: "You clearly have not gotten it," blaming him for "being all over the place" and for making "an imputation you can't sustain." *Email from Veitch to Buchmiller*, Nov. 13, 1998, 11:55 a.m. Rev. Veitch wrote that the issue between them became "personal," and

that same day, Plaintiff filed an EEO Complaint[1] against Captain Buchmiller, alleging the following as the basis for his complaint:

> Need assistance and counsel re: content of sermons. Feeling harassed by command chaplain. This is the second time this has happened. A third instance occurred with twists on a sermon from Matthew 10. I have been counselled [sic] about negativity and non-pluralism without adequate definition.

EEO Complaint, Nov. 13, 1998.

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[1]The EEO Complaint was filed through the Navy's formal grievance channels, established under the authority of 10 U.S.C. § 5013(g), for military personnel to file allegations of reprisal or of discrimination based on race, color, religion, gender, or national origin.

[2]The *Chaplains Manual* outlines important policies with respect to the overarching purpose and role of chaplains in the Navy, including the environment of pluralism:

> The religious context of the Navy, like that of American society at large, is one of religious pluralism, in which independent churches and religious bodies coexist in mutual respect. Because of the impracticality of providing clergy of every faith or denomination in every ship or station, the Navy and the churches of America evolved jointly a pattern of cooperative ministry. The principle of cooperative ministry places on every chaplain the obligation to:
>
> a. Make provision for meeting the religious needs of those in the command who are adherents of other churches.
>
> b. Cooperate with other chaplains and commands in meeting the religious needs of members of the chaplain's own faith group.

Chaplains Manual § 1202(5).

Commander Lawrence Zoeller, a Medical Corps Officer, conducted the equal opportunity investigation and concluded that Rev. Veitch "engaged in nonpluralistic activity as evidenced by his sermons and his statements to the inquiry officer."2 *EEOC Report*, ¶ 4. Commander Zoeller also concluded that Captain Buchmiller counseled Chaplain Veitch both formally through mid-term counseling and his fitness report, and informally during the past 10 months to be less negative in his sermons and have a "more pluralistic approach to Christian ministry." *Id.* Commander Zoeller's report included the following definition of pluralism:

> Pluralism is a well-established doctrine encompassing both ethical . . ., administrative . . ., and practical standards . . ., in the USN Chaplain Corps. The basic tenant of pluralism has a long history in the Chaplain Corps . . . . In laymen's terms the Navy Chaplain must minister to all faiths in such a manner to be inclusive . . . to all and unoffensive . . . to all Navy personnel. *EEOC Report*, Attach. 1. Based on this concept, Commander Zoeller determined that Chaplain Veitch's sermons were "derogatory to other faiths because of specific references to basic beliefs of other religions," and dismissed Plaintiff's EEO Complaint. *EEOC Report*, ¶ 4, Attach. 1.

Commander Zoeller testified that he believed that Navy chaplains would "have to be very careful to be pluralistic in their sermons," especially knowing that there could be members from a different religious group or denomination in their congregations. *Zoeller Dep.* at 33:11-34:19. Plaintiff's congregation was composed of several Evangelical Protestant denominations, including liturgical and evangelical. *Bryan Decl.* ¶¶ 2, 7(c). In support of his

claim that Commander Zoeller improperly labeled his sermons as non-pluralistic, Plaintiff cites to the testimony of Lieutenant Commander Mark Hendricks, who was deposed as an authority on the Navy's policy of pluralism and made representations on behalf of the Navy about that policy. Commander Hendricks explicitly stated that 10 U.S.C. § 6031 and Naval Regulation 08173 "are two of the policy statements that speak to what chaplains are able to do," and that "the concept of pluralism would most closely depict the environment in which we're called to serve as chaplains in the military," noting that "the Navy doesn't dictate what is preached, so the chaplain has freedom in that environment." *Hendricks Dep.* at 27:10-24; 127:11-24. Plaintiff concedes, however, that after November 13, 1998, Captain Buchmiller neither mentioned the issue of Sola Scriptura nor ever raised problems with any of Plaintiff's sermons. *Veitch Dep.* at 398-99. His additional basis for alleging discrimination and hostility is premised on Captain Buchmiller's alleged remark to Plaintiff's wife shortly after his arrival in Naples that he "won't be doing much here." While the parties contest the meaning of this statement, Plaintiff concedes that Captain Buchmiller had assigned him the duty to assist with Vacation Bible School. *Veitch Dep.* at 270-71, 282-83. Plaintiff did not take this assignment seriously because he learned about it from a less senior chaplain. *See Veitch Dep.* at 281-83. Plaintiff, however, did not attempt to address the issue of collateral duties with Captain Buchmiller. *Veitch Dep.* At 257. In Rev. Veitch's June 1998 mid-term counseling report,

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[3] 10 U.S.C. § 6031 and Naval Regulation 0817, which mirrors it, specify that "[a]n officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member." 10 U.S.C. § 6031 (2004).

Captain Buchmiller noted that Chaplain Veitch did not perform collateral duties. *Fitness Report for Veitch,* from Dec. 1997-Mar. 1998; *see Buchmiller Decl.*, ¶ 3. In the "Mission Accomplishment and Initiative" section of the fitness report, Captain Buchmiller remarked that Plaintiff did "only what [he] want[ed] to do." *Fitness Report for Veitch,* from Dec. 1997-Mar. 1998. Chaplain Veitch was also characterized as "not dependable: and not being "private" in his e-mails, needing "more cooperation with . . . [Vacation Bible School.]" *Fitness Report for Veitch,* from Dec. 1997-Mar. 1998.

In January 1999, Plaintiff was assigned six collateral duties, including Vacation Bible School. *Buchmiller Decl.* ¶ 3, Attach.1. Plaintiff, however, was dissatisfied with the nature of his duties and expressed his discontent in an e-mail to Captain Buchmiller: "I offered, at midterm counselling [sic], a rejoinder to which you offered no dispute or counter. And then, all of a sudden, I am assigned in 1999 "6" duties? Called from the "bench" to the field? That is a weak metaphor. The 'grave' is more appropriate. You put me in the grave, dead, cold, lifeless, and now, there is to be a resurrection? . . . . That will be like trying to get blood out of a turnip. Chaplain Buchmiller, you are not Jesus . . . not even close." *E-mail from Veitch,* Feb. 8, 1999.

Plaintiff stated that he would not perform any collateral duties that involved working with Captain Buchmiller or Chaplain Pike "for personal and religious reasons." *Veitch Dep.* at 415-16 (referring to *E-mail from Veitch,* Feb. 8, 1999). Plaintiff also testified that after he had mentioned to Chaplain Buchmiller that he was thinking about resignation, Chaplain Buchmiller began to ask him on a daily basis when he would resign. *Veitch Dep.* at 285:8-287:4, 410:6-411:2. Plaintiff, however, acknowledged that

Captain Buchmiller stopped asking him about resignation upon Plaintiff's request. *Veitch Dep.* at 287:1-4.

Following these events, Captain Coyne, the commanding officer, became aware of the email correspondence between Plaintiff and Captain Buchmiller. After reviewing the EEOC Report completed by Commander Zoeller, Captain Coyne concluded that there was no evidence of discrimination against Rev. Veitch, instead finding that Plaintiff's conduct was not "in keeping" with his understanding of the relationship between a Lieutenant Commander and a Captain. *Coyne Dep.* at 68-69 (finding that the content of the e-mails deviated "from a military bearing and discipline standpoint." *Id.* at 71.) At the time Plaintiff was contemplating filing another discrimination complaint against Captain Buchmiller, Captain Coyne pressed charges against Plaintiff for disrespect toward Captain Buchmiller. Captain Coyne testified that this measure was supported by his finding that Chaplain Veitch "attacked [Buchmiller's] position as a senior officer," demonstrating "continued insubordination." *Coyne Dep.* at 84, 184. Plaintiff admitted that he thought it was conceivable that Captain Coyne might consider some of his emails to Captain Buchmiller to be disrespectful. *Veitch Dep.* at 421; *see also id.* at 330:13-15 (acknowledging that there was "an element of sarcasm[,] . . . frustration and annoyance" in his emails to Captain Buchmiller.) Plaintiff testified that he believed that it was "not standard practice" to address a senior officer disrespectfully, but that he felt that he was entitled to use a sarcastic tone after having unsuccessfully attempted to resolve his problems. *Veitch Dep.* at 330-33, 335-36.

Based on his finding of insubordination, Captain Coyne initially considered taking Plaintiff to court-martial, but he determined that a "Captain's Mast," a form of non-judicial punishment under Article 15 of the Uniform Code of Military Justice ("UCMJ"), would be appropriate. *See Coyne Dep.* at 147-48 (testifying that as a commanding officer he had various options for discipline, such as "various sorts of letters and/or court martial." *Id.* at 154:6-10.) As a result, Rev. Veitch was charged with "disrespect towards a superior commissioned officer for e-mails from September 2, 1998, through February 8, 1999, sent to Captain Buchmiller that showed "marked disdain, insolence, and contempt" under Article 89 of the UCMJ and for "failure to go to appointed place of duty" for absences on August 14, 1998, October 9 and 29, 1998, and November 30, 1998, under Article 86.4 *Veitch Dep.* at 423-24, 426-27, Ex. 19. After consulting with counsel, Veitch refused the Captain's Mast. *Veitch Dep.* at 434-35. Captain Coyne then decided to pursue the charges through court-martial proceedings. *See, e.g., Coyne Decl.* ¶ 4. In anticipation of the court-martial, Plaintiff was removed from his preaching duties, *Coyne Dep.* at 102, and reassigned duties at the Family Service Center. *Veitch Dep.* at 454. Veitch's fitness report prepared by Captain Coyne stated that Plaintiff was "unwilling to adapt to military requirements. . . . Continues to create friction within the

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[4] The following failures were recorded in the Inspector General Report: On August 14, 1998, Plaintiff failed to appear for the arrival of the USS Arleigh Burke, and to provide an orientation brief to its crew. *DOD Military Whistleblower Reprisal Investigation*, Apr. 24, 2000, at 14 (hereinafter "*DOD Investigation*"). On October 9, 1998, he failed to give a chaplain briefing without authority. Plaintiff also failed to go to All Officer Meetings held on October 29 and November 30, 1998. *DOD Investigation*, at 14.

chapel community. [Was] [u]nwilling to work with other chaplains. Uses religious persecution as an excuse for poor performance. . . . [Was] [d]etrimental to command mission accomplishment. Was removed from pulpit for failure to preach pluralism among religions." *Veitch's Fitness Report,* June 15, 1999. Captain Coyne recommended that Veitch be separated as unfit to be a Navy Chaplain. *Id.*

In his deposition, Captain Coyne in retrospect explained that his removal of Rev. Veitch from his pulpit was entirely based on his concern that Plaintiff would use the pulpit to launch personal attacks not only on Captain Buchmiller but also on other chaplains and servicemen and to denigrate other religious beliefs. *Coyne Dep.* at 89-90, 102:4-9. Captain Coyne believed that "the theoretical disputes between Captain Buchmiller and Commander Veitch . . . under no circumstances would . . . justify the tone and the demeanor of the e-mails that Commander Veitch sent to Captain Buchmiller." *Coyne Dep.* at 182:24-183:5. Lieutenant Commander Hendricks explained that although the "Navy does not dictate what chaplains preach in the context of their sermons," chaplains must exercise decorum and courtesy in addressing others as needed to maintain "good order and discipline in that command." *Hendricks Dep.* at 83.

The events preceding Plaintiff's actual separation unfolded as follows. After initially requesting a court martial in lieu of the non-judicial Captain's Mast, Rev. Veitch, with the advice of his assigned Navy JAG counsel, resigned his commission. *First Am. Compl.* at ¶ 25. Plaintiff testified that the JAG attorney told him that resignation was one of his options to avoid the overseas court-martial. *See Veitch Dep.* at 424-26. Following Veitch's resignation, Captain Coyne

terminated the court-martial charges, instead issuing a Nonpunitive Letter of Caution, dated April 8, 1999. *Coyne Decl.* ¶ 5. In April 1999, shortly after he submitted his request for resignation, Plaintiff requested that the Department of Defense (DOD) Inspector General (IG) investigate the circumstances surrounding his resignation. *See DOD Investigation; First Am. Compl.* ¶ 27. Plaintiff's complaint alleged that his resignation was coerced and that Chaplain Buchmiller had created a culture of religious prejudice and oppression against him and the evangelical faith groups at Naples. *Id.* In May of 1999, DOD IG reported that it would investigate Plaintiff's complaint. *See, e.g., First Am. Compl.* ¶ 28.

On May 17, 1999, Plaintiff's resignation was approved with a November 1999 separation date. In June of 1999, Captain Coyne's tour of duty as the Commanding Office at Naples ended and he was relieved by Captain B.J. Gray. *Coyne Decl.* at ¶ 6. On July 23, 1999, Plaintiff wrote a letter to the Secretary of the Navy, via the new Commanding Officer, Captain Gray, and the Chief of Naval Personnel, requesting to withdraw his resignation and claiming that his March 1999 resignation was coerced. *Veitch Dep.* at 456-57, Ex. 24. Captain Gray forwarded Plaintiff's withdrawal request, strongly recommending disapproval. *Gray Decl.* ¶ 3. In early November of 1999, the Office of the Secretary of the Navy ordered Plaintiff's resignation orders held in abeyance pending the outcome of the DOD IG's investigation into his reprisal complaint.*First Am. Compl.* ¶¶ 31-32. The Inspector General investigation was completed on May 23, 2000, concluding that Plaintiff's "disciplinary problems . . . resulted from his own misconduct" and that his allegations of reprisal were unsubstantiated. *See Gott Dep.* at 20-22, Ex. 1. Plaintiff was informed that the DOD IG did not find

impropriety on the part of the Navy. *Veitch Dep.* At 475-76, Ex. 33. The DOD IG investigation report contains a statement made by Captain Coyne that it was his "judgment that [the] letter of resignation coupled with the nonpunitive letter was sufficient punishment for what [Veitch] had done." *DOD Investigation*, at 26.

On September 30, 2000, Plaintiff was separated from the Navy. *Veitch Dep.* at 493. On November 21, 2000, Plaintiff received his leave payment from the Navy. *Veitch Dep.* at 480:21-481:1. On December 13, 2000, Plaintiff filed his complaint in this Court for declaratory and equitable relief and moved for a preliminary injunction, requesting, *inter alia*, that this court order the Navy to pay Plaintiff for the alleged unused leave remaining when he was separated from active duty. In December 2000, Defendants mailed a check for payment of unused leave to Plaintiff. *Argall Decl.*

On February 27, 2001, this Court denied Plaintiff's motion for a preliminary injunction, holding that Plaintiff failed to demonstrate that he would suffer irreparable harm if his motion were denied, and that Plaintiff had not demonstrated that he had a substantial likelihood of success on the merits of his claims. *Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001).

DISCUSSION

I. SUMMARY JUDGMENT PRINCIPLES

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R.

CIV. P. 56(c). In this case, the parties have filed cross-motions for summary judgment, and they disagree on some facts pertaining to their differing legal theories. Cross-motions for summary judgment do not alone warrant granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed,

> (1) because a party entitled to summary judgment must bear the burden of establishing the indisputability of the facts which warrant judgment in his favor;
> (2) while the facts, which would justify judgment for one party on a particular legal theory, may be indisputable, the facts, which would justify judgment for the adverse party on a different legal theory, may be disputed; and (3) a party may make concessions for the purpose of his motion that do not carry over and support the motion of his adversary.

Volunteer State Life Ins. Co. v. Henson, 234 F. 2d 535, 537 (5th Cir. 1956) (citing 6 Moore's Federal Practice, 2d ed. 2092, Par. 56.13.); *see Bricklayers, Masons and Plasterers Int'l Union of America v. Stuart Plastering Co.*, 512 F. 2d 1017, 1023 (5th Cir. 1975) ("The rationale for this rule . . . is that each party moving for summary judgment may do so on different legal theories dependent on different constellations of material facts."). Thus, when deciding cross-motions for summary judgment, the court "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F. 3d 503, 506 (6th Cir. 2003).

Summary judgment is regarded as "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (quoting FED. R. CIV. P. 1.). The court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259, 106 S. Ct. 2505, 2516 (1986) (internal citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986) (internal citation omitted). Furthermore, Rule 56 requires that a plaintiff, "in advance of trial and after a motion for summary judgment has been filed . . . come forward with some minimal facts to show that the defendant may be liable under the claims alleged." *Sharafeldin v. Md. Dep't of Pub. Safety and Corr. Servs.*, 131 F. Supp. 2d 730, 736 (D. Md. 2001), *aff'd* 21 Fed. Appx. 227, 2001 (4th Cir. 2001) (unpublished opinion). If the nonmoving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then "the plain language of Rule 56(c) mandates the entry of summary judgment." *Celotex Corp.*, 477 U.S. at 322-23. "Moreover, only disputed issues of *material* fact, determined by reference to the applicable substantive law, will preclude the entry of summary judgment." *Sharafeldin*, 131 F. Supp. 2d at 736. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

Applying these principles to the facts of this case, the court has concluded that Defendants' motion for summary judgement must be granted because Plaintiff has failed to show Defendants' liability for the claims alleged as explained below.

II. Constructive Discharge Versus Voluntary Resignation

The threshold issue in this case is whether Plaintiff's resignation was voluntary or coerced, as his standing to seek relief in this court is contingent on the court's finding of constructive discharge. *See Taylor v. Fed. Deposit Ins. Corp.*, 132 F. 3d 753, 767 (D.C. Cir. 1997); *Kim v. United States*, 47 Fed. Cl. 493, 497 (2000). The court examines all the facts and circumstances in order to determine whether a specific resignation or retirement qualifies as voluntary. *See McIntyre v. United States*, 30 Fed. Cl. 207, 211 (1993). Generally, resignations are presumed to be voluntary. *See, e.g., Kim*, 47 Fed. Cl. at 497. "The presumption of voluntariness, however, can be rebutted [1] by demonstrating that the government caused the plaintiff to resign under threat of duress or by other coercion, [2] by demonstrating that the government intentionally misrepresented information relied on to the plaintiff's detriment, or [3] by showing that the plaintiff tried to withdraw his resignation before its effective date . . . ." *McIntyre*, 30 Fed. Cl. at 211; *see Bergman v. United States*, 28 Fed. Cl. 580, 585 (1993); *Christie v. United States*, 207 Ct. Cl. 333, 337-41, 518 F.2d 584, 587-88 (1975).

In the present case, Plaintiff argues that he was constructively discharged because of intolerable work conditions created by Captain Buchmiller along with some other chaplains, alleging that the religious hostility towards

Evangelical Protestants was intolerable and that Chaplain Buchmiller's "policy, program and practice of religious discrimination and personal prejudice made plaintiff's working conditions oppressive, intolerable and corrosive." *First Am. Compl.* ¶ 75. Plaintiff's additional theory is premised on his allegation of duress that rendered his resignation involuntary. Plaintiff argues that he was constructively discharged because Chaplain Buchmiller along with some other chaplains coerced him into resignation by preventing him from preaching strictly the tenets of his religion and directing him to "preach pluralism among religions." He claims that the Navy coerced him into resigning by threatening him with court-martial, and, alternatively, alleging that he was misled into resigning because the charge underlying the court-martial – disrespect toward a superior commissioned officer in violation of UCMJ Article 89 – was unconstitutional and otherwise legally unsupportable. *Pl. Br. in Supp. Of Opp'n and Cross-Mot. for Summ. J.*, at 33. The court will address these theories and further examine all other facts and circumstances that Plaintiff argues coerced him into resignation.

a. Plaintiff's Claim of Intolerable Work Conditions

To establish constructive discharge based on religious hostility or discrimination, the plaintiffs must not only show acts of discrimination, "but also that the employer deliberately made work conditions intolerable, leading the employee to quit involuntarily." *See Adair v. England*, 183 F. Supp. 2d 31, 67 (D.D.C. 2002) (considering the pleading requirements for individual Navy chaplains' claims of constructive discharge). Although the case law addressing the theory of intolerable work conditions involves civilian

workers bringing Title VII discrimination claims,[5] the standards articulated in those cases are instructive.

In deciding whether a work environment is hostile, courts have looked at the totality of circumstances from a reasonable person perspective and from the plaintiff's subjective perspective. *See, e.g., Mungin v. Katten Muchin & Zavis*, 116 F. 3d 1549, 1558 (D.C. Cir. 1997) (A constructive discharge requires "a finding of discrimination and the existence of certain 'aggravating factors' . . . that would force an employee to leave."); *Taylor*, 132 F. 3d at 766 ("[A] constructive discharge occurs where the employer creates or tolerates discriminatory working conditions that would drive a reasonable person to resign."); *Goldmeier v. Allstate Ins. Co.*, 337 F. 3d 629, 635 (6th Cir. 2003); *Hafford v. Seidner*, 183 F. 3d 506, 512 (6th Cir. 1999); *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F. 3d 1073, 1080 (6th Cir. 1999); *Kocsis v. Multi-Care Management, Inc.*, 97 F. 3d 876, 887 (6th Cir. 1996). Such circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23, 114 S. Ct. 367, 371 (1993); *Conway-Jepsen v. Small Business Admin.*, 303 F. Supp. 2d 1155, 1167 (D. Mt.

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[5] Title VII protection is extended to employees in "military departments" and executive agencies," 42 U.S.C. § 2000e-16(a) (2004), but the EEOC has interpreted Title VII not to apply to uniformed members of the military departments. *See Hodge v. Dalton*, 107 F. 3d 705, 707-12 (9th Cir. 1997) (upholding this interpretation and noting consensus of the circuit courts of appeals on that issue).

2004) (the plaintiff, a female federal employee, established a Title VII retaliation claim because she reasonably found her hostile working conditions intolerable due to her supervisor's "lengthy, continuous, and pervasive pattern of retaliatory treatment for the reason that [the plaintiff] had objected to employment practices which were unlawful under Title VII."). Furthermore, to establish hostile work environment, the plaintiff must show that the offending behavior was "sufficiently severe or pervasive to alter the conditions of . . . [his] employment and create an abusive working environment." *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004) (quoting *Meritor Sav., FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986)).

In this case, Captain Buchmiller approached Veitch believing that Plaintiff's sermons were improperly negative and undermined the environment of pluralism enshrined in the rules of the Navy Chaplain Corps. *See, e.g, Chaplains Manual* § 1202(5). For instance, in one of his sermons, Veitch allegedly preached that there were unregenerate clergy in the Chaplain Corps. *See Prelim. Inquiry EEO Complaint*, at 2, 5. Plaintiff admitted that Captain Buchmiller criticized his sermons only on a few occasions, and there are no indicia of religious animosity toward Plaintiff in Captain Buchmiller's e-mails. Furthermore, Plaintiff conceded that Captain Buchmiller neither mentioned the issue of Sola Scriptura nor ever raised problems with any of Plaintiff's sermons after November 13, 1998. *Veitch Dep.* at 398-99. Likewise, Captain Buchmiller stopped inquiring about Plaintiff's plans to resign upon Plaintiff's request. *Veitch Dep.* at 287:1-4. Plaintiff has not met his burden of proving "intolerable" conditions that would have compelled a reasonable person to resign because Captain Buchmiller's actions were not "severe or pervasive" considering the totality of circumstances6. *See*

Suders, 124 S. Ct. at 2347, 2357 (holding that there were genuine issues of material fact concerning the plaintiff's hostile work environment and constructive discharge claims, where, *inter alia*, the plaintiff's "male supervisors subjected her to a continuous barrage of sexual harassment" until the time she resigned); *Conway-Jepsen*, 303 F. Supp. 2d at 1161 (finding hostile environment where the employer assigned numerous "program-irrelevant" work projects to the plaintiff, made their completion impossible by shutting down computers early, and screamed and swore at the plaintiff for making clerical mistakes).

In addition, the declarations and depositions by several individuals – mostly civilians involved in the Navy chapel as members or workers at relevant times – submitted by Plaintiff to support his argument that the environment at the Chaplain Corps under the leadership of Buchmiller was hostile toward evangelicals, do not furnish any concrete descriptions of that environment. These declarations provide purely subjective feelings of those individuals without establishing an objective basis for their experience of hostility. No other facts point to "intolerable" work conditions that would force a reasonable person to resign. *See Mungin*, 116 F. 3d at 1558. Therefore, Plaintiff did not demonstrate a triable issue of hostile work environment.

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[6] The court need not decide whether Captain Buchmiller's remarks concerning Plaintiff's sermons constituted religious discrimination or a violation of Plaintiff's First Amendment rights. It suffices to determine that regardless of whether Captain Buchmiller could advise Chaplain Veitch on the Navy's policy of pluralism, Captain Buchmiller's remarks about Plaintiff's sermons were not so pervasive or severe as would force a reasonable person to resign. *See Suders*, 124 S. Ct. at 2347.

b. Plaintiff's Claim of Duress

In order to prove duress, the plaintiff must establish "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." *Pitt v. United States*, 420 F. 2d 1028, 1032 (Ct. Cl. 1970) (internal citation omitted); *see Brown v. United States*, 30 Fed. Cl. 227, 229-30 (Fed. Cl. 1993) (finding voluntary resignation where the plaintiff, a former Army service member, 1) chose the conditions of his resignation; 2) had the alternative of appearing before a court-martial and facing the impending charges against him; and 3) "[did] not dispute that he was court-martialed for the legitimate purpose of imposing criminal sanctions, rather than for the purpose of inducing his resignation"); *Kim*, 47 Fed. Cl. at 494, 498-99 (finding voluntary resignation where the plaintiff, a commissioned major in the U.S. Army Medical Service Corps, had a reasonable alternative to requesting retirement because she had the option of challenging the allegedly improper elimination action by the Army before a Board of Inquiry); *but see Roscos v. United States*, 213 Ct. Cl. 34, 549 F.2d 1386, 1389 (1977) (finding that the plaintiff's, an IRS employee's, retirement was involuntary because the plaintiff's wrongful transfer to a distant city coupled with the hardship to his family constituted "unjustifiable coercive action by the Government" where it was infeasible for the plaintiff to commute daily to a new work site and impractical for him to relocate because of the indefinite resolution of his administrative appeal).

Plaintiff in this case claims that the Navy coerced him into resignation by seeking to connect Captain Coyne's

decision to bring the charge of disrespect with Captain Buchmiller's alleged acts of religious hostility or discrimination and to cast them as a concerted effort by the Navy to induce Plaintiff's resignation. Specifically, Plaintiff argues that he was coerced to resign because 1) the "Navy's attempt to court-martial Chaplain Veitch was an act of gross misconduct in that it had no foundation since its underlying basis rested on [Commander] Zoeller's unlawful, unconstitutional definition of pluralism," and that 2) "Captain Coyne's Captain's Mast and his decision to bring Chaplain Veitch to court-martial cannot have a legal effect" because the charge underlying the court-martial was unconstitutional and otherwise insupportable. *Pl. Br. in Supp. of Opp'n and Cross-Mot. for Summ. J.*, at 33-39.

The evidence on the record, however, abundantly shows that Rev. Veitch was not charged with "disrespect toward a superior commissioned officer" based on the doctrinal grounds that underlay the dispute between Plaintiff and Captain Buchmiller. Captain Coyne's objective was to discipline Rev. Veitch for his disrespectful demeanor and failure to appear at appointed places. Plaintiff did not contest the primary factual basis for the disrespect charge, admitting that his emails to Captain Buchmiller were sarcastic, deviating from "standard practice." *See Veitch Dep.* at 330-33, 335-36. The charge of "disrespect toward a superior commissioned officer" was based on Captain Coyne's conclusion that Chaplain Veitch failed to treat another chaplain of a higher rank with due respect.[7] *See*

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[7]The Manual for Courts-Martial defines "disrespectful behavior" as follows:

Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer.

Coyne Dep. at 84, 184. In addition, Plaintiff did not establish how this disciplinary charge, based on the content of Plaintiff's e-mails to Captain Buchmiller, is a reprisal for Plaintiff's EEO Complaint. Furthermore, Commander Zoeller's phrase that Chaplain Veitch was removed from his pulpit for "failure to preach pluralism" is not a completely accurate description of the reason for Plaintiff's removal from the pulpit. The record shows that Captain Buchmiller criticized Plaintiff's sermons for denigrating other chaplains and did not instruct or direct Plaintiff to "preach pluralism" or any other doctrine. In fact, this inept phrase appeared in the fitness report completed by Captain Coyne *after* he learned about the e-mail correspondence between Plaintiff and Captain Buchmiller and decided that Chaplain Veitch should be disciplined for his disrespectful demeanor. *See Veitch's Fitness Report*, June 15, 1999. Plaintiff's claim that he was not allowed to preach in a certain manner, which arguably violated the Navy's policy of pluralism, *see, e.g, Chaplains Manual* § 1202(5), does not exonerate Plaintiff from his failure to respect a fellow chaplain who was senior in rank.

Considering Plaintiff's claim that bringing a chaplain to court-martial under Article 89 is unconstitutional or otherwise illegal, the court believes that there cannot be a rule that it is always unconstitutional to charge a chaplain with disrespect toward a superior commissioned officer.

> It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense.

Manual for Courts-Martial, Art. 89, United States (2000 ed.).

The court's conclusion in *Rigdon v. Perry* that a Navy chaplain could not be a "superior commissioned officer" in the context of the Article 89 was stated in dictum, and the constitutionality of subjecting chaplains to military discipline has not been directly addressed by a higher court. *See* 962 F. Supp. 150, 158-59 (D.D.C. 1987). Nonetheless, the Second Circuit held that an independent civilian chaplaincy would not be a feasible alternative to the existing Chaplain Corps because, *inter alia*, there was no evidence that "civilian chaplains would *accept military discipline, which is essential to the efficient operation of our armed forces.*" *Katcoff v. Marsh*, 755 F. 2d 223, 236 (2d Cir. 1985) (emphasis added); *see also In re England, Sec'y of the Navy*, 375 F. 3d 1169, 1171 (D.C. Cir. 2004) (observing that a Navy chaplain has a "unique" role within the service, "involving simultaneous service as clergy . . . and as a commissioned naval officer.").

Furthermore, in this case, Plaintiff's claim that the court-martial was illegal or unconstitutional is not dispositive for Plaintiff's claim of constructive discharge because Plaintiff admitted that his decision to resign was motivated by his desire to avoid the court-martial proceeding. *First Am. Compl.*, ¶ 25. *See Pitt*, 420 F. 2d at 1032-33 (finding that the plaintiff resigned voluntarily even though the underlying court-martial was unconstitutional because the plaintiff's "predominant purpose" was "to defeat court-martial jurisdiction by severing his employment connection with the Army."[8]). In addition, no evidence in the record suggests that at the time of his resignation, Rev. Veitch thought that the charge of disrespect was

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[8]*Pitt* involved an Army civilian employee who was charged with various homosexual and lewd acts, some of which involved minors. The Army authorities decided to court-martial the plaintiff. The plaintiff resigned on

unconstitutional. *See Veitch Dep.* at 335-36, 344-45, 421. Importantly, Plaintiff had two reasonable alternatives to resignation, a Captain's Mast or the court-martial. *See e.g., Brown*, 30 Fed. Cl. at 230-31; *Pitt*, 420 F. 2d at 1034. Plaintiff's argument that remaining in the Navy and fighting the disrespect charge would have been futile and, therefore, the court-martial was not a reasonable alternative to resignation is without merit.

As commissioned officers, chaplains are subject to the court-martial jurisdiction, *see Coppedge v. Marsh* [9], 532 F. Supp. 423 (D.C. Kan. 1982), and even though military courts do not have the expertise to consider certain constitutional claims, those constitutional claims can be raised during court-martial proceedings. *See, e.g., Schlesinger v. Councilman*, 420 U.S. 738, 759-60, 95 S. Ct. 1300, 1313-14 (1975); *Noyd v. Bond*, 395 U.S. 683, 696 n.8, 89 S. Ct. 1876, 1884 n.8 (1969).

Finally, no facts point to the possibility that the Navy intentionally misrepresented information relied on to Plaintiff's detriment. *See Bergman*, 28 Fed. Cl. at 587-88. Plaintiff had the opportunity to obtain the advice of counsel from the time he was charged with Article 89. Thus, he refused the option of a Captain's Mast and subsequently resigned to avoid the court- martial after having consulted with counsel.

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the eve of his trial and was terminated when the court-martial was well under way. 420 F. 2d at 1030. Subsequently, the Supreme Court held unconstitutional an overseas court-martial trial of civilian employees of the armed forces charged with noncapital offenses in time of peace. *Id.* at 1031 (citing *Wilson v. Bohlander, sub nom. McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 80 S. Ct. 305 (1960)).

[9] In *Coppedge v. Marsh*, the plaintiff was a reserve commissioned officer and chaplain, who was tried by a general court-martial and was convicted of "conduct prejudicial to good order and discipline, of service discrediting,

c. Other Factors of Voluntariness

Under certain circumstances, the presumption of voluntariness can be rebutted by Plaintiff's showing that he tried to withdraw his resignation before its effective date. *See Brown*, 30 Fed. Cl. at 230-31; *Cunningham v. United States*, 423 F. 2d 1379, 1384-85 (Ct. Cl. 1970). Furthermore, the agency has to exercise a "discernible" discretion in denying the withdrawal of a resignation. *Cunningham*, 423 F. 2d at 1384-85 (holding that a civilian Air Force employee's resignation was involuntary, where, two weeks prior to the effective date of the employee's resignation, the Air Force denied her request to withdraw her resignation, unilaterally deciding that it did not consider the withdrawal of the resignation to the mutual advantage of the employee and the Air Force). "The court's power to review a military department's decision is limited to determining whether the action was improper because it was 'arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure' of a substantive nature by which plaintiff has been severely prejudiced.'" *Gallucci v. United States*, 41 Fed. Cl. 631, 642 (Fed. Cl. 1998) (quoting *McIntyre*, 30 Fed. Cl. At 213).

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and of conduct unbecoming an officer." 532 F. Supp. At 424. The plaintiff filed an action in federal court asking the court to restrain the Army from releasing him from active duty until all appeals of his court-martial conviction were exhausted. The district court held that it had jurisdiction, but found that the plaintiff failed to state a claim as to a violation of his due process rights under the Fifth Amendment and failed to state a claim that the distinction that the Secretary of the Army had drawn between regular army officers and reserve officers operated to deny reserve officer's equal protection. 532 F. Supp. at 426-30. *See also United States v. Ward*, 13 M.J. 626, 631-32 (1982), *aff'd in part, rev'd in part on othergrounds*, 16 M.J. 341 (1983) (A chaplain's status as a commissioned officer on active duty stationed in a foreign country made him subject to the court-martial jurisdiction.).

In the present case, Plaintiff claims that the Navy's refusal to accept his withdrawal of the resignation was arbitrary and capricious. Plaintiff filed his request for withdrawal prior to the effective date of his resignation; however, the Navy, unlike the defendant in *Cunningham*, ordered Plaintiff's resignation order held in abeyance pending the outcome of the DOD IG's investigation into Veitch's reprisal complaint. *See* 423 F. 2d at 1384-85. Only after the DOD IG had completed its investigation, finding that Plaintiff's "disciplinary problems . . . resulted from his own misconduct" and that his allegations of reprisal were unsubstantiated, was Plaintiff finally separated. *See Gott Dep.* at 20-22, Ex. 1. Thus, there was a discernible exercise of discretion by the Navy to suspend Plaintiff's separation awaiting the outcome of DOD IG's investigation.

Plaintiff, however, claims that the conclusions of the DOD IG's investigation into his allegations of religious repression and prejudice were superficial, allegedly omitting Plaintiff's allegations of religious repression and prejudice; "not interviewing identified witnesses; not addressing the trivial and unexamined nature of the charges brought against plaintiff, or even if there were a basis in fact or in law for the charges." *First Am. Compl.* ¶ 34. It should be noted that the DOD IG's investigation did not specifically concern the voluntariness of Plaintiff's resignation. *Cf. Cunningham*, 423 F. 2d at 1382-85 (finding that in considering the plaintiff's request for a grievance hearing to determine the voluntariness of her resignation, the grievance committee

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[10] The court concluded that in affirming its decision, the Air Force Commander improperly relied solely upon its own grievance procedures, while the plaintiff was entitled to some additional procedural protections required under the Veterans' Preference Act. 423 F. 2d at 1382.

conducted an insufficient investigation into the plaintiff's resignation10). The DOD IG conducted the investigation under 10 U.S.C. § 1034,[11] into Plaintiff's allegations that in reprisal for making certain protected communications, he was relieved of his duties as a Navy chaplain and assigned duties at the Family Service Center. *See Letter from IG to Veitch,* May 23, 2000, *DOD Investigation.* The DOD IG found that responsible officials did not retaliate against Rev. Veitch for making protected communications. *Id.* The DOD IG investigator interviewed Rev. Veitch, identified relevant personnel actions, interviewed "responsible military officers" for each personnel action, and interviewed relevant witnesses identified by Plaintiff. The investigation did not attempt to determine if the e-mails that Chaplain Veitch sent to Captain Buchmiller were sufficiently disrespectful to warrant Captain's Mast or court-martial because Captain Coyne, as Commanding Officer, "was the one to make that decision." *Id.* at 22 n.15.

Even though the investigator found that it was due to Plaintiff's EEO Complaint that Captain Coyne decided to look at Chaplain Veitch's competency to be a military chaplain, the reprisal charges were not supported because by that time Captain Coyne had issued Rev. Veitch an adverse fitness report and had received the EEO Complaint investigation report [12] indicating that the complaint was

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[11] The Military Whistleblower Protection Statute, 10 U.S.C. § 1034 (2004).

[12] Plaintiff also argues that Commander Zoeller's investigation into his EEO Complaint was arbitrary, capricious and contrary to law because it reached a conclusion contrary to 10 U.S.C. § 6031 and the Establishment clause. Plaintiff, however, does not have standing to challenge that investigation because the court finds that Plaintiff voluntarily resigned.

unsubstantiated and possibly frivolous. *Id.* at 23. The DOD IG noted that given the tone of Rev. Veitch's e-mails to Captain Buchmiller, it was possible that Captain Coyne realized that he needed to look more closely at Chaplain Veitch's demeanor. *Id.*

Importantly, Plaintiff did not demonstrate how the DOD IG's findings were contrary to law. While the scope of the DOD IG investigation was limited as mandated by the relevant statute, the DOD IG investigation was not arbitrary or capricious, and its conclusions will not be upset by this court.[13]

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[13] It should be noted that in this context, Plaintiff has not addressed the issue of administrative exhaustion. The Supreme Court has recognized the applicability of the doctrine of exhaustion of administrative remedies within the military departments. *See Pirisi v. Davidson*, 405 U.S. 34, 37-38, 92 S. Ct. 815, 817-18 (1972) (holding that the petitioner, who fully utilized the procedures and corrective opportunities of the military administrative apparatus in the Army with respect to his request to be discharged as a "conscientious objector," was entitled to seek habeas corpus relief in the federal district court on the ground that the denial of his request had no factual basis, notwithstanding that court-martial proceedings were pending against him wherein he could assert as defense his entitlement to the conscientious objector status. *Id.* at 45, 92 S. Ct. at 821-22.). The court explained that "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Id.* at 37, 92 S. Ct. at 818. In this case, Plaintiff could seek further remedies before the Board of Correction of Naval Records, including application for correction of his military records under 10 U.S.C. § 1034. *See Letter from IG to Veitch*, May 23, 2000, *DOD Investigation. But see Adair*, 183 F. Supp. 2d at 55 (holding that the plaintiffs, the Navy chaplains, did not have to exhaust their administrative remedies before bringing their constitutional challenges based on the First Amendment's Establishment and Free Exercise Clauses and the Fifth Amendment's Due Process Clause, reasoning that "[r]esolving a claim founded solely upon a constitutional

In sum, Plaintiff had a reasonable alternative to resignation – to appear before the courtmartial and raise his defenses against the charge of disrespect. Plaintiff was also offered an opportunity to resolve the disrespect charge through the non-judicial Captain's Mast. Plaintiff has not sufficiently established that he resigned because of Defendant's coercive actions, illegal actions, or an intolerable work environment. *See, e.g., McIntyre*, 30 Fed. Cl. at 211.

III. PLAINTIFF'S REMAINING CLAIMS

Defendants argue that because Plaintiff has voluntarily resigned from the Navy and is no longer subject to the alleged unlawful practices of the Navy Chaplain Corps, Plaintiff lacks standing to seek declaratory and injunctive relief to challenge the Navy's activities. Federal courts are limited to issuing decisions that resolve an actual "case or controversy." *See* U.S. CONST. art. III, § 2. Standing is one of the "essential" elements of the "case or controversy" requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (The plaintiff bears the burden of establishing standing.). In order to establish standing, Plaintiff must demonstrate (1) an "injury in fact," which requires Plaintiff to show "an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,' . . . (2) a causal relationship between the injury and the challenged conduct, . . . [i.e.] the injury 'fairly can be traced to the challenged action of the defendant,' and has

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right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Id.* (quoting *Downen v. Warner*, 481 F. 2d 642, 643 (9th Cir. 1973)).

not resulted 'from the independent action of some third party not before the court,' . . . and (3) a likelihood that the injury will be redressed by a favorable decision." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-65, 113 S. Ct. 2297, 2301-02 (1993) (internal citations omitted). Importantly, a plaintiff seeking prospective relief, such as declaratory or injunctive relief in this case, must show more than a "past injury"; he must demonstrate that he is "realistically threatened by a repetition" of the alleged violation in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 124, 103 S. Ct. 1660, 1669, 1676 (1983).

In this action, Plaintiff seeks declaratory and injunctive relief. *See First Am. Compl.* at 27-29. Plaintiff asks this court, *inter alia*, to declare that the Navy illegally discharged him and "[b]urdened, suppressed and interfered with plaintiff's religious beliefs and expression of those beliefs in violation of the Constitution, [the] RFRA, 10 U.S.C. § 6031, the Civil Rights Act and other federal laws" and that the court order "the Navy to take immediate and permanent steps to end and to remedy the Navy's prejudice and bias against evangelical chaplains and evangelical faith groups in general and at Naples in particular." *First Am. Compl.* at 28. However, Plaintiff is no longer in the Navy because of his voluntary resignation and is not facing any "real and immediate" injury "as the result of the challenged official conduct." *See, e.g., Lyons*, 461 U.S. at 102.

The District of Columbia Circuit has held that even where a plaintiff voluntarily chose to remove himself from active status in the Navy, the justiciability of his claimed constitutional violations that preceded his decision to retire was not affected. *See Emory v. Sec'y of Navy*, 819 F.2d 291, 294

(D.C. Cir. 1987) (holding that the district court could not dismiss the plaintiff's claim for lack of subject matter jurisdiction14). The court of appeals explained that even though the district court lacked the authority to order that the plaintiff, a retired naval reserve medical corps captain, be promoted retroactively to a rank he sought, the district court had jurisdiction to consider the plaintiff's constitutional claims, noting that the district court had the power to fashion some relief if it determined that the plaintiff's claim was meritorious. *Id.* at 294.

However, in *Taylor v. Fed. Deposit Insurance Corp.*, the District of Columbia Circuit held that a finding against a claim of constructive discharge necessarily denies a plaintiff the element of causation required to establish his standing to seek reinstatement based on his First Amendment claim, and the plaintiff's voluntary resignation moots his request for a permanent injunction against future retaliation by eliminating the possibility of future harm and the utility of the injunction. 132 F. 3d at 767-68. The facts in this case are closer to those in *Taylor* than in *Emory*. Plaintiff here lacks standing to seek reinstatement as a remedy because his injury, his separation from the service, was not caused by the Navy. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984) (stating that to establish standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). Even had the Navy violated Plaintiff's First Amendment or

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[14] In *Emory*, a retired naval reserve medical corps captain brought an action against the Navy, claiming that his non-selection for a certain promotion was a result of racial discrimination and seeking declaratory and injunctive relief. 819 F.2d at 291.

equal protection rights, the court can not decide this issue as Plaintiff has no standing because of his own action. *Cf. Taylor*, 132 F. 3d at 767 ("In requesting reinstatement, [plaintiffs] seek a remedy for injury that is in large part self-inflicted. This is true whether we treat the defect as a matter of standing or the merits."). Because Plaintiff left the Navy on his own accord, the court lacks jurisdiction over the remaining claims in this case.

CONCLUSION

Because Plaintiff did not meet his burden of rebutting the presumption of voluntariness of his resignation in this case and did not show any material dispute as to his claim of constructive discharge, the court lacks jurisdiction over his remaining claims based on his service in the military.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is **GRANTED**.

It is further

ORDERED that Plaintiff's cross-motion for summary judgment is **DENIED**.

A separate Order accompanies this Memorandum Opinion.

April 4, 2005
Dated: _____

/s/ Judith M. Barzilay
_____
Judith M. Barzilay
Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D. PHILIP VEITCH Plaintiff, v. HON. GORDON R. ENGLAND, SECRETARY OF THE NAVY, et al., Defendants.	)	Civil Action No. 00-2982

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that Defendants' motion for summary judgment is **GRANTED**; and it is **FURTHER ORDERED** that Plaintiff's cross-motion for summary judgment is **DENIED**; and it is **FURTHER ORDERED** that this case is dismissed.

This is a final appealable order.

Dated: April 4, 2005

/s/ Judith M. Barzilay
JUDITH M. BARZILAY
Judge

(3)

No. 06-1187

In the Supreme Court of the United States

D. PHILIP VEITCH, PETITIONER

v.

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of standing petitioner's constitutional challenge to the conditions of his employment in the United States Navy Chaplaincy Corps and his request for declaratory and injunctive relief, where petitioner had voluntarily resigned from the Navy, the evidence failed to support his claim of constructive discharge, and the Navy acted reasonably in denying his request to withdraw his resignation due to his repeated acts of insubordination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 471 F.3d 124. The opinion of the district court (Pet. App. A24-A58) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 28, 2006. The petition for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an ordained minister in the Reformed Episcopal Church, joined the Chaplain Corps of the United States Navy in 1987 and served as a commissioned officer from June 1987 until September 2000. Pet. App. A2, A25. While stationed at the Naval Support

Activity at Naples, Italy, petitioner's immediate supervisor was Captain Ronald Buchmiller and his commanding officer was Captain John J. Coyne. *Id.* at A2-A3, A26.

Disagreements developed between Buchmiller and petitioner over petitioner's chaplaincy activities, including his failure to provide chaplaincy services in a manner that was consistent with the Navy's need to serve individuals from a range of religious backgrounds and his delivery of sermons that were "derogatory toward other faiths." Pet. App. A3. As part of the disagreement, petitioner sent "rather caustic emails" to his superior officer, Captain Buchmiller. *Ibid.*

Petitioner filed an Equal Employment Opportunity (EEO) complaint alleging that Captain Buchmiller's criticisms of his behavior constituted religious harassment. The investigating officer, Commander Zoeller, found that petitioner's "allegation of religious discrimination was unsubstantiated." Pet. App. A3. Petitioner "concede[d]" that, after November 1998, Buchmiller "neither mentioned" their theological disagreement over a doctrine known as "Sola Scriptura" nor "ever raised problems with any of [petitioner]'s sermons." *Id.* at A32. Petitioner did not seek further review of the Zoeller Report or its dismissal of his EEO complaint.

In January 1999, petitioner resumed sending improper emails to Buchmiller and, the next month, announced his refusal to "perform any collateral duties that involved working with Captain Buchmiller" or another Navy chaplain. Pet. App. A33. That same month, petitioner emailed a "four-page broadside attack on Buchmiller's command and character." *Id.* at A4. Petitioner conceded that some of his emails to Buchmiller could be considered "disrespectful." *Id.* at A34. The emails led Captain Coyne to seek non-judicial punish-

ment in the form of a Captain's Mast, see 10 U.S.C. 815, charging petitioner with "disrespect towards a superior commissioned officer," and demonstrating "marked disdain, insolence, and contempt" toward a superior, in violation of Article 89 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 889. See Pet. App. A35. Petitioner was also charged with "failure to go to appointed place of duty" for having missed four staff meetings without justification, in violation of Article 86 of the UCMJ, 10 U.S.C. 886. Pet. App. A4, A35.

After consulting a Navy attorney, petitioner refused nonjudicial punishment. Coyne then pursued the same charges through a court martial. Pet. App. A35. At that point, petitioner chose to resign to avoid the court martial. *Id.* at A4, A35-A36, A49. Coyne then dropped the court-martial charges and issued petitioner a Nonpunitive Letter of Caution. *Id.* at A4.

In April 1999, petitioner requested that the Department of Defense Inspector General investigate whether Buchmiller and Coyne had retaliated against him for filing his EEO complaint and probe the circumstances surrounding his resignation. Pet. App. A4. When the Navy Inspector General agreed to investigate the complaint, petitioner requested permission to withdraw his resignation. The Navy initially denied that request, but then suspended the resignation orders pending completion of the Inspector General study. *Id.* at A4-A5. In May 2000, the Inspector General issued a report that concluded that petitioner's "allegations of reprisal were unsupported," *id.* at A5, and that petitioner's "disciplinary problems * * * resulted from his own misconduct," 1 C.A. App. 517. In September 2000, petitioner was separated from the Navy. Pet. App. A5.

Three months after his separation, petitioner filed suit against the Navy and several of its officers seeking relief for alleged violations of his First Amendment rights to free speech and the free exercise of religion, the Establishment Clause, the Fifth Amendment, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* See Pet. App. A5. The amended complaint seeks a declaratory judgment that the defendants violated petitioner's constitutional rights, an injunction "voiding or rescinding plaintiff's illegal separation," and an order directing the Navy to prevent future alleged religious discrimination in the Chaplaincy Corps. 1 C.A. App. 38-40.[1]

The district court granted summary judgment for the defendants. Pet. App. A24-A58. The court first held that petitioner failed to establish a basis for his allegation that he was constructively discharged from the Navy. *Id.* at A44-A55. The court concluded that petitioner did not identify "a triable issue of hostile work environment," because he identified no facts that "point to 'intolerable' work conditions that would force a reasonable person to resign." *Id.* at A45. The court also found no factual basis for petitioner's allegation that theological differences underlay the disciplinary charges brought against him, noting that the "evidence on the record * * * abundantly shows that" the charges were not based on "doctrinal grounds." *Id.* at A47. The court explained that "[t]he record shows that Captain Buchmiller criticized [petitioner]'s sermons for denigrating other chaplains and did not instruct or direct

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[1] The amended complaint did not include any claim for money damages, beyond a claim for back pay, which has since been resolved and is no longer at issue in the case. See Pet. App. A38.

[petitioner] to 'preach pluralism' or any other doctrine." *Id.* at A48.

In addition, the court noted that petitioner "admitted that his decision to resign was motivated by his desire to avoid the court-martial proceeding," and further held that he had two "reasonable alternatives" to resignation—the Captain's Mast or the court martial—so that resignation was not the only reasonable course of action left to him. Pet. App. A49-A50.

With respect to the Navy's decision not to permit him to withdraw his resignation, the court held that the Navy's action was not arbitrary, capricious, or otherwise in violation of the law. The court noted that the Navy reasonably withheld action pending the Inspector General's investigation and denied withdrawal only after that report found that his "disciplinary problems . . . resulted from his own misconduct." Pet. App. A52. The court further noted that the Inspector General's investigation was fairly conducted, and petitioner did not demonstrate that the Inspector General's findings "were contrary to law." *Id.* at A54. Beyond that, the court explained, petitioner had failed to exhaust his administrative remedies because he could have sought relief before the Board of Correction of Naval Records and could have applied for correction of his military records pursuant to 10 U.S.C. 1034(f). Pet. App. A54 n.13.

Finally, the court held that, because petitioner's resignation was voluntary, petitioner lacked standing to seek declaratory and injunctive relief against the Navy's practices and policies within the chaplaincy program. Noting that petitioner "is no longer in the Navy because of his voluntary resignation," the district court held that petitioner "is not facing any 'real and immediate' injury as the result of the challenged official conduct." Pet.

App. A56 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)).

3. The court of appeals affirmed. Pet. App. A1-A23. Assuming without deciding the existence of a cause of action for constructive discharge from the military, *id.* at A6-A7, the court of appeals affirmed the district court's conclusion that petitioner had failed to adduce facts to support his constructive discharge claim. With respect to his reliance on Commander Zoeller's report dismissing petitioner's EEO complaint, the court noted that the report "in no sense punished or threatened him; it simply rejected his [EEO] Complaint," *id.* at A8, and that it could "hardly be claimed that the Zoeller Report left [petitioner] with no practical alternative but resignation," *id.* at A9. Moreover, the court noted, petitioner "could have appealed the results of Zoeller's investigation, but chose not to do so." *Ibid.*

With respect to petitioner's argument that the court-martial charges compelled his resignation, the court explained that "[a] court-martialed serviceman or woman has a congressionally enacted process of military appeals by which to contest allegedly unlawful charges," but petitioner "neglected to exhaust [those] military court remedies." Pet. App. A10. The court likewise rejected petitioner's assertion of a hostile work environment, agreeing with the district court that, "viewing the record in the light most favorable to [petitioner], his claims fail to make out a hostile work environment as a matter of law." *Id.* at A12. The court held, in particular, that petitioner failed to allege conduct "sufficiently 'severe and pervasive' to create an aggravated work environment in which an employee had no choice but to resign." *Id.* at A14.

Finally, the court of appeals agreed with the district court that the record provides "no grounds to conclude that the Navy acted unreasonably in refusing [petitioner's] withdrawal request" and, instead, establishes that petitioner's "disciplinary troubles were the result of his own misconduct." Pet. App. A16. Because the record established that he resigned voluntarily, the court held that petitioner lacked standing to pursue his constitutional challenges to the Navy's chaplaincy program. *Id.* at A15.

Judge Rogers concurred. Pet. App. A17-A23. She agreed that, having voluntarily resigned from the Navy, petitioner lacked standing to bring his claim for reinstatement or his equitable claims regarding the conditions of his former employment. *Id.* at A17. She also explained that petitioner failed to prove either that the employment discrimination he alleges "required him to be disrespectful in violation of the Uniform Code of Military Justice," or that "the Captain's Mast or court-martial proceedings would have been so unfair so as to force his resignation." *Id.* at A21.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner's claims of retaliatory discharge and religious discrimination are fact-bound and have been rebuffed at every level of administrative and judicial review. They do not warrant further review in this Court.

Petitioner contends (Pet. 10-16) that this Court should grant review because the Navy purportedly engaged in "gross governmental misconduct" in allegedly

requiring that he "preach pluralism." Pet. 11. That contention does not merit review for at least four reasons.

First, as the court of appeals held (Pet. App. A15), petitioner lacks standing to challenge the Navy's chaplaincy policies because he voluntarily resigned from the Navy and is not part of the chaplaincy program. "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (quotation marks and citation omitted). The Court accordingly lacks jurisdiction to review the policies that petitioner challenges.

Second, petitioner failed to exhaust his administrative remedies. Pet. App. A10, A54 n.13. Petitioner could have raised each of his claims concerning the conditions of his employment with the Navy as a defense in his Captain's Mast or court-martial proceeding. See *Manual for Courts-Martial, United States* ¶ 13.c.(5) (2005 ed.) ("A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89."). Furthermore, if convicted, petitioner could have sought review by the court-martial's convening authority and, following that, by the Navy Judge Advocate General. See 10 U.S.C. 859-867. In addition, in cases involving dismissal or discharge, a service member has a right of appeal to the United States Navy-Marine Corps Court of Criminal Appeals

and, by petition, to the United States Court of Appeals for the Armed Forces. *Ibid.*[2]

Allowing petitioner's claim to go forward would circumvent the administrative appeals process that Congress specifically designed for the resolution of employment disputes within the military. See Pet. App. A10-A11; cf. *Parisi* v. *Davidson*, 405 U.S. 34, 41-42 (1972) (exhaustion requirement applies to courts-martial when the accused could gain complete relief before such tribunals).

Third, the alleged misconduct had nothing to do with petitioner's voluntary resignation. As the district court explained:

> The record shows that Captain Buchmiller criticized [petitioner]'s sermons for denigrating other chaplains and did not instruct or direct [petitioner] to "preach pluralism" or any other doctrine. In fact, this inept phrase appeared in the fitness report completed by Captain Coyne *after* he learned about the e-mail correspondence between [petitioner] and Captain Buchmiller and decided that [petitioner] should be disciplined for his disrespectful demeanor.

Pet. App. A48.

The district court, the court of appeals, and the Navy Inspector General have all concluded that petitioner failed to provide any sound factual basis for his allegations that the disciplinary proceedings directed against him were the product of theological discrimination or improper retaliation. Each has independently determined that the record clearly establishes that petitioner's disciplinary problems were the result of his own

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[2] Decisions of the Court of Appeals for the Armed Forces can be reviewed by this Court. 28 U.S.C. 1259.

inappropriate and disrespectful conduct toward a superior officer. Pet. App. A5, A14-A15, A21, A48. There is no reason for this Court to revisit, much less upset, those unassailable and fact-bound determinations.[3]

Fourth, petitioner's claims of unconstitutional conduct are fact-specific and record-bound and thus do not present any question that merits this Court's exercise of its certiorari jurisdiction. There is no conflict in the circuits on the standing, exhaustion, or constructive discharge claims that petitioner asserts. Quite the opposite, the Ninth Circuit recently dismissed a similar case

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[3] In any event, the Navy's policies fully comport with the Constitution. The *Chaplains Manual* makes clear that a chaplain is free to preach the tenets of his or her faith, but must treat other chaplains and military personnel with "mutual respect" and a spirit of "cooper[ation]," given the unique demands of Navy service. See U.S. Navy, *Chaplains Manual* § 1202(5); 2 C.A. App. 721.

> The religious context of the Navy, like that of American society at large, is one of religious pluralism, in which independent churches and religious bodies coexist in mutual respect. . Because of the impracticality of providing clergy of every faith or denomination in every ship or station, the Navy and the churches of America have evolved jointly a pattern of cooperative ministry. The principle of cooperative ministry places on every chaplain the obligation to:
>
> a. Make provision for meeting the religious needs of those in command who are adherents of other churches.
>
> b. Cooperate with other chaplains and commands in meeting the religious needs of members of the chaplain's own faith group.

Chaplain's Manual, *supra*, § 1202(5); see *Katcoff* v. *Marsh*, 755 F.2d 223, 226 (2d Cir. 1985) (explaining that, because of the unique demands of military service, military chaplains must function in a "pluralistic military community").

on the ground that a plaintiff who had left the Navy "has no standing to pursue his claims that involve generalized critiques of the Navy's management of the Chaplain Corps." *Wilkins* v. *United States*, No. 05-56109, 2007 WL 1455012, at *1 (May 18, 2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

REV. D. PHILIP VEITCH,

Petitioner,

v.

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY

Petitioner submits the following reply in accord with Supreme Court Rule 15.6 to address new issues Respondents raised in their Opposition (the "Opp."). Respondents raise the issue of Petitioner's failure to exhaust administrative remedies as a reason to affirm the challenged decisions. Opp. at 5 (Statement - citing Pet. App. A54 n.13) and 8-9 (Argument - citing Pet. App. A10, A54 n.13). Respondents' suggestion is inappropriate for two reasons. First, the Court of Appeals recognized Petitioner had a valid claim under the Administrative Procedure Act challenging the Secretary's decision not to accept his resignation, a fact respondents did not contest. Pet. App. A15.

Second, the issues petitioner raises and his underlying claims fall within the exceptions recognized by *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992). An administrative agency cannot declare the legality of the Navy's insistence that its undefined religious doctrine of pluralism trumps petitioner's rights under the First Amendment's Establishment and Free Exercise Clauses and 10 U.S.C. § 6031 to preach the doctrines of his church.[1] An administrative agency cannot enjoin the Navy's continued censorship or retaliation should Petitioner be returned to active duty, nor can it determine whether a junior chaplain's e-mails protesting a senior chaplain's sermon censorship or harassment can be considered disrespect. The Department of Defense Inspector General expressed doubts about the Equal Opportunity Investigator ("EOI")'s conclusions that petitioner's sermons violated pluralism and his command chaplain could censor those sermons; it ordered the Naval Inspector General (NIG)

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[1]Respondents have consistently defended the Equal Opportunity ("EO") Investigator's conclusions that petitioner's sermons were not pluralistic and his EO complaint was frivolous.

to reexamine the EOI's conclusions. Pet. App. A16 n.5. Ignoring § 6031 and First Amendment considerations, the NIG concluded the EOI was correct, i.e., petitioner's sermons were not pluralistic and his complaint of censorship was an abuse of process.

Whether the NIG's conclusion is consistent with § 6031 or the Establishment Clause and whether the NIG's failure to properly review the EOI's conclusions deprived the Secretary of Navy information critical to his decision to reject petitioner's request to withdraw his resignation are legal questions. *McCarthy*, 503 U.S. at 147-48, recognized administrative agencies are not competent to address these issues nor can they provide injunctive relief should petitioner be successful. Moreover, there is no statute requiring exhaustion of his claims. *See Darby v. Cisneros*, 509 U.S. 137, 146-47, 153 (1993) (APA claims do not require exhaustion unless required by statute). Likewise, whether the lower courts have improperly sanctioned government misconduct, *see* Petition at 11-16, by failing to carefully examine the Establishment Clause or statutory issues, *id.* at 16-18, are judicial not administrative issues.

Respondents also grossly misstate the context of the dispute between Protestant petitioner and CAPT Buchmiller, his Catholic command chaplain, alleging Veitch failed "to provide chaplaincy services in a manner consistent with the Navy's need to serve individuals from a range of religious backgrounds and his delivery of sermons that were 'derogatory toward other faiths.'" Opp. at 2. Petitioner's evidence showed (1) his congregation grew from about 20 or 30 to over 90 during the short time he was their pastor, precisely because he preached classic Protestant doctrine (which offended his Catholic superior but drew evangelical Protestants); (2) this growth occurred although his congregation was Pentecostal and evangelical whose worship

style was completely foreign to his denominational experience;[2] (3) his congregation loved him, and (4) CAPT Buchmiller was hostile to Protestant evangelicals.[3] CAPT Buchiller never heard petitioner's sermons, and neither CAPT Coyne nor the NIG investigators could identify which parts of petitioner's sermons were not pluralistic.

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[2] Petitioner alleged his assignment as a liturgical chaplain to pastor a non-liturgical, Pentecostal congregation whose worship style was foreign to his experience was evidence of CAPT Buchmiller's hostility toward both petitioner and the evangelical, charismatic Maranatha congregation. *See* App. A-13 ("Veitch was assigned to pastor the 'Maranatha' worship service, to which Veitch's conservative liturgical tradition was inimical.").

[3] The lower courts ignored uncontested evidence that the command chaplain's hostility to evangelical Protestants drove them from the Naples chapel and numerous Protestant congregations sprang up off base.

CONCLUSION

The Court should grant Rev. Veitch's Petition for Certiorari.

Respectfully submitted,

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